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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 40.

MIDSTATE HORTICULTURAL COMPANY, INC.
Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR RESPONDENT.

JOHN DICKINSON,
WILLIAM F. ZEARFAUS,
JOHN B. PRIZER,
1740 BROAD ST. STATION BLDG.,
PHILADELPHIA, PA.
Counsel for Respondent.

FREDERIC D. MCKENNEY,
W. H. STAMMER,
Of Counsel for Respondent.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA

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OCTOBER TERM, 1943. No. 40.

Midstate Horticultural Company, Inc.
Petitioner,

v.

The Pennsylvania Railroad Company
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court of Appeal, Fourth District, California (R. 171-79), and the dissenting opinion of Mr. Justice Pro Tem Schottky (R. 179-91), were published on April 16, 1942, and are not officially reported but will be found in 124 P. (2d) 902. The unanimous opinion of the Supreme Court of California (R. 196-204) was published on November 27, 1942, and is reported at 21 Cal. (2d) 243, 131 P. (2d) 544.

JURISDICTION.

The jurisdiction of this Court is invoked by petitioner under Section 237 of the Judicial Code, as amended (28 U. S. C. 344 (a) and (b)).

STATUTE INVOLVED.

This case involves the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, 49 U. S. C. 1 *et seq.*, as amended. The pertinent provisions thereof, as they were in effect at the time of the transactions under consideration, are as follows:

> "Sec. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful" (41 Stat. 479).
>
> "Section 3 (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any

undue or unreasonable prejudice or disadvantage in any respect whatsoever" (24 Stat. 380).

"Section 6 (7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs" (34 Stat. 587).

"Section 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be taxed and collected as part of the costs in the case" (24 Stat. 382).

"Section 16. * * *

"(3) (a) All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof,

shall be begun within three years from the time the cause of action accrues, and not after" (43 Stat. 633).

"(b) All complaints against carriers subject to this Act for the recovery of damages not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d)" (43 Stat. 633).

"(c) For recovery of overcharges action at law shall be begun or complaint filed with the commission against carriers subject to this Act within three years from the time the cause of action accrues, and years after, subject to subdivision (d); except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice" (43 Stat. 633).

QUESTION PRESENTED.

In a suit by a carrier against a shipper to collect the full amount of unpaid freight charges lawfully due, does the Interstate Commerce Act require that a written agreement *by the shipper* not to plead the limitation provision contained in Section 16 (3) (a) of the Act must be held invalid, where the agreement was made before the expiration of the limitation period, as part of an understanding whereby the carrier agreed to forego suit for a short specified period in order to enable the shipper to further investigate the claim, and where the carrier, in reliance on the shipper's agreement, did actually refrain from bringing suit for the specified time, the statutory period having expired in the meanwhile?

STATEMENT OF THE CASE.

During the months of October and November, 1932, petitioner shipped twenty-one carloads of grapes over the respondent's railroad lines (R. 1-2 *et seq.*).* The grapes were shipped by petitioner as consignor to itself as consignee (R. 1-2 *et seq.*). In accordance with petitioner's diversion orders the grapes were delivered by respondent to Jerome Distributing Company as petitioner's agent, at Manhattan Produce Yards, N. J., between October 28 and November 21, 1932 (R-2, 4 *et seq.* and 51-52 *et seq.*).

Respondent's transportation charges on these shipments, in accordance with tariffs on file with the Interstate Commerce Commission, amounted to $13,678.86 (R. 38). These charges have never been received by respondent (R. 94 *et seq.*). Together with interest, they constitute the amount of the judgment in this case (R. 86).

Respondent and its connecting carriers transported the grapes and delivered them to Jerome Distributing Company, petitioner's agent, from which latter concern respondent received three checks for the full amount of the freight charges (R. 100-105). In accordance with its general custom respondent delivered receipted freight bills to Jerome in exchange for these checks (R. 105, 124). Thereafter the checks issued by Jerome and delivered to respondent were dishonored by the bank upon which they were drawn (R. 100-104, 126-128).

Respondent subsequently made repeated attempts to collect the freight charges. It sued Jerome and obtained a judgment, which it was unable to satisfy because Jerome had become insolvent. Respondent also attempted to collect from petitioner (R. 3 *et seq.*; 94 *et seq.*; 121, 122).

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*This case involves twenty-one shipments, each of which was treated as a separate cause of action. The circumstances in connection with each shipment are practically identical. Therefore, where the record sets forth circumstances concerning a certain shipment which likewise obtain with respect to the others, reference to the pages of the record where they first appear only are shown and are followed by the words "*et seq.*"

All such attempts were unsuccessful and the transportation charges are still unpaid (R. 3 *et seq.* and 94 *et seq.*).

Section 16 (3) (a) of the Interstate Commerce Act, as it was then in effect, provided as follows (43 Stat. 633):

> "All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after."

The three-year period of limitation thus provided by the statute expired on October 28, 1935, with respect to the earliest shipment (R. 4). Prior to that time respondent proposed and threatened to bring suit against petitioner for the collection of the transportation charges (R. 40). Petitioner requested respondent to give it additional time for the purpose of investigating the claim and to withhold the filing of the action until January 1, 1936 (R. 40). To secure such an extension of time, petitioner executed a written agreement with respondent providing as follows (R. 39-41):

> "The Mid State Horticultural Company, Inc., a Corporation of the State of California, hereby agrees that:
>
> "Whereas, The Pennsylvania Railroad Company is urging against the said Mid State Horticultural Company, Inc. a claim for the proper and lawful transportation charges, aggregating (subject to correction) $13,678.86, on twenty-one shipments of grapes made by the said Mid State Horticultural Company, Inc. from points in California during the month of October, 1932, which were moved to New York City or vicinity, and there delivered to the Jerome Distributing Company, Inc. during the month of November, 1932, which shipments, identified by car number, and the amount due on each thereof, are as follows:

PFE	36495	$687.73	PFE	71402	$682.63
PFE	24375	683.83	PFE	35599	638.33
PFE	1478	660.43	PFE	28824	667.33
PFE	71971	589.38	PFE	71097	583.38
PFE	36105	689.73	PFE	14118	579.03
PFE	14745	662.83	PFE	16444	671.53
PFE	13607	670.33	PFE	32461	682.43
PFE	15847	658.13	PFE	16386	619.63
SFRD	17404	695.51	SFRD	18007	621.58
SFRD	22471	698.33	PFE	13520	617.58
					$13,678.86

"And whereas The Pennsylvania Railroad Company proposes to bring suit against the said Mid State Horticultural Company, Inc. looking toward the recovery and collection of such charges on October 28, 1935.

"And whereas the said Mid State Horticultural Company, Inc. desires additional time for investigation and consideration of said claim, and thus requests The Pennsylvania Railroad Company to withhold the institution of any such action until January 1, 1936.

"And whereas The Pennsylvania Railroad Company is willing, in the hope that the said Mid State Horticultural Company may conclude to pay said claim without the necessity of litigation, to defer the institution of suit thereon until January 1, 1936, or until such earlier date as the said Mid State Horticultural Company may definitely refuse to pay said claim, the understanding being that The Pennsylvania Railroad Company may then institute such a suit within a reasonable time, not exceeding one month, after January 1, 1936, or after the date of such refusal to pay.

"Now, therefore, in consideration of the forebearance of The Pennsylvania Railroad Company to bring such a suit against the Mid State Horticultural Com-

pany, Inc. prior to October 28, 1935, the said Mid State Horticultural Company, Inc. hereby agrees that if and when The Pennsylvania Railroad Company may find it necessary to bring such an action, it, the said Mid State Horticultural Company, Inc., will not plead in any such suit the defense of any general or special statute of limitations.

"This agreement is not an admission of the alleged debt by the Mid State Horticultural Company, Inc., and is made without prejudice to any other defenses which the said Mid State Horticultural Company, Inc. may have to said claim.

"Dated at Philadelphia, Pa. this 25th day of October, 1935.

"MID STATE HORTICULTURAL COMPANY, INC.

By

(S) A. SETRAKIAN
Vice-President."

On December 26, 1935, petitioner definitely refused to pay any part of the charges (R. 3 *et seq.* and 53 *et seq.*). This action was commenced on December 31, 1935, within the period specified in the above quoted agreement and less than two months after the running of the statute of limitations hereinabove referred to (R. 197). Thereupon petitioner, in spite of its express agreement to the contrary, pleaded the statute of limitations (R. 52 *et seq.*).

Petitioner was directly liable for the freight charges under the bills of lading, as owner of the goods and as actual consignee. The bills of lading provide in Section 7 thereof (R. 38B):

"The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; * * *"

Jerome Distributing Company, to which the shipments were delivered, was not the ultimate consignee, but was merely petitioner's receiving agent (R. 2 *et seq.*). In the pleadings it was admitted that petitioner was the actual consignee (R. 52 *et seq.*).

The delivery by respondent was made to Jerome, as petitioner's agent, under petitioner's written diversion orders (R. 2 *et seq.* and 51-52 *et seq.*).

Nowhere in its briefs or petitions has petitioner contended that either the delivery to Jerome or the acceptance of checks from Jerome by respondent constitutes an affirmative defense to this action against petitioner under the bills of lading.

Petitioner raises the defense of the statute of limitations, in open repudiation of its agreement not to do so. It makes no defense to its liability on the merits. Petitioner did advance in the courts below a subsidiary defense of alleged estoppel, based on the fact that respondent's agent gave petitioner's agent, Jerome, receipted freight bills in exchange for Jerome's checks. Petitioner apparently abandoned this defense below, and does not argue it at all in its brief in this court, although the facts on which it is based are mentioned at the end of its "Statement of the Case." This point will be discussed briefly in the latter part of respondent's brief herein.

Thus, respondent in this case has performed transportation services for petitioner, under the contract between the two parties as embodied in the bills of lading, for which services respondent has not been paid. Respondent, having been unable to collect the charges for its services from petitioner's agent, Jerome, endeavored to collect those charges from petitioner, as consignee and actual owner of the shipments, and, shortly prior to the expiration of the statutory period of limitations, threatened to bring suit against petitioner for that purpose. Petitioner thereupon requested respondent to refrain from bringing suit, in order to permit petitioner to make a further in-

vestigation of the facts. For the purpose of thus inducing respondent to refrain from bringing suit, petitioner promised not to plead the statute of limitations, and accordingly respondent, relying on such promise, agreed not to bring suit for a stated period, amounting to approximately two months. This agreement was reduced to writing, and in that written agreement petitioner and respondent also agreed as to the specific amounts which were due to respondent for its services in transporting the shipments in question. After the statutory period had expired, but before the expiration of the two-months period provided in the agreement, petitioner definitely stated its intention not to pay the charges, whereupon this suit was brought.

ARGUMENT.

There can be no question on the merits as to petitioner's liability for the charges. It was not only the consignor but also the actual consignee and owner of the goods, Jerome being but its agent. The bills of lading, which petitioner duly executed, provided that "the owner or consignee shall pay" the charges. Its liability under such provisions in the contract of carriage is clear: *Pittsburgh C. C. & St. L. Ry. Co.* v. *Fink*, 250 U. S. 577, 40 S. Ct. 27 (1919); *N. Y. Cent. R. R.* v. *York & Whitney Co.*, 256 U. S. 406, 41 S. Ct. 509 (1921).

Petitioner's defense is the statute of limitations. It claims that its agreement not to raise that defense must be declared invalid and disregarded as being designed to promote discriminations and preferences contrary to the provisions and policy of the Interstate Commerce Act. In support of this position petitioner cites many cases, in some of which actual unjust discriminations and undue preferences contrary to the express prohibitions of the Interstate Commerce Act were involved, and in others of which it was held that a waiver by a *carrier* of the statute

of limitations or other defense available to it should be held invalid as likely to promote unjust discriminations and undue preferences by carriers among shippers. No reported decision cited by petitioner or known to respondent has held that an agreement on the part of a *shipper* not to plead the statute of limitations, such as that involved in the present case, is invalid; on the contrary, the only reported case on the question holds that such a waiver is valid. It will be shown below that there is nothing in the agreement involved in the present case, whereby petitioner promised not to plead the statute of limitations, which constitutes an unjust discrimination or an undue preference in violation of the prohibitions of the Interstate Commerce Act, or which would constitute a precedent making possible unjust discriminations or undue preferences in other cases, and that there is nothing either in the language or in the policy of the Act to prevent petitioner from being held to its promise, in accordance with basic and long established principles of the common law.

I. It is a Basic Principle of the Common Law that the Statute of Limitations May Not be Pleaded Against a Creditor Who Has Refrained From Bringing Suit Within the Statutory Period in Reliance on the Debtor's Promise Not to Plead the Statute.

Reduced to its basic elements, this is a case where a debtor, being threatened with suit by his creditor, as the statutory period of limitation nears its end, proceeds, by begging additional time for the purpose of further investigating the facts and promising not to plead the statute of limitations as a defense, to induce the creditor to refrain from bringing suit until after the statutory period has expired, and then repudiates his promise and relies solely on the statute of limitations in resisting the creditor's suit. In those simple terms, the case is one which

would admit of no doubt, under well-established and elementary principles of law. Practically all the cases and authorities are agreed that, where one owing a matured debt promises his creditor not to plead the statute of limitations as a defense to the debt, the purpose of the promise being to induce the creditor to refrain from bringing suit prior to the expiration of the statutory period, and where the creditor in reliance on that promise does refrain from suing prior to the expiration of the statutory period, the debtor will not be permitted to plead the statute of limitations in a suit brought promptly thereafter by the creditor. The grounds for this elementary rule are variously stated in the cases in terms of waiver or estoppel or implied new promise to pay the debt. But the result is clear and undisputed—the basic reason apparently being that any other result would permit the debtor to perpetrate an unconscionable fraud upon his creditor for the purpose of escaping payment of his just debt. The many authorities to this effect are collected and reviewed in Wood on Limitations (4th Ed., 1916), Sec. 76, Williston on Contracts (Rev. Ed., 1936), Secs. 183, 184, 689, and in numerous other treatises and discussions, and principles to the same effect are adopted by the Restatement of Contracts, Sec. 86 (2) (c), Comment, and Sec. 90. As stated in Wood, *supra*, Sec. 76:

> "While a promise not to plead the statute, whether made before or after the debt is barred, does not amount to an acknowledgment thereof or a promise to pay it, yet, *if made before the debt is barred, and in consideration of forbearance to sue, and the creditor does forbear to sue upon the faith of the promise, it is binding upon the debtor*, and at least has the effect to keep the debt on foot until the statutory period, dating from such promise, expires, either by way of estoppel, or as a conditional promise to pay the debt in case the plaintiff proves it. *An agreement not to plead the statute of limitations,*

if upon good consideration, is valid, and forbearance to sue is such good consideration." (Emphasis supplied.)

A few cases may be cited as examples. Thus, in *Randon v. Toby*, 11 How. 493 (1850), this Court, speaking through Mr. Justice Grier, said, with respect to a written agreement by a debtor not to plead the statute of limitations (p. 519):

"This agreement, being founded on a good consideration and accepted by the plaintiff, became incorporated in the notes, and formed a part of the contract, by mutual consent. It extended the time of payment, and the statute did not begin to run till the extended time had expired. It operated also by way of estoppel *in pais* to a defence under the statute of limitations. *Otherwise the defendant would gain an advantage by his own fraud*, or put the plaintiff to an action on the agreement. On one or the other of these principles, the doctrine of estoppel has its foundation. The plea of the statute is a breach of the agreement, and, to avoid circuity of action, it may be set up in avoidance of the plea." (Emphasis supplied.)

In *Gaylord v. VanLoan*, 15 Wend. (N. Y.) 308 (1836), the New York court, in rejecting a debtor's plea of the statute of limitations on the ground that it was contrary to his agreement not to plead the statute, said (pp. 310, 313-14):

"The agreement not to plead the statute, as respects this note, operated as a fraud upon the plaintiff. Had it not been made, he could have prevented the effect of the statute by commencing his suit. By pleading the statute, the defendant is guilty of bad faith, and, upon general principles, should be estopped from availing himself of that defence. No one ought

to be permitted to disregard his own deliberate, lawful agreement, to the injury of another. • • • *Not only in conscience, but in law, the defendant cannot be allowed to set up his own breach of faith, or fraud, in order to derive an advantage for himself, to the injury of the person deceived by him. It would be giving him the fruits of his iniquity, and bidding a bounty upon treachery and fraud.*" (Emphasis supplied.)

In *Webber* v. *Williams College*, 23 Pick. (Mass.) 302 (1840), Mr. Chief Justice Shaw, for the Supreme Judicial Court of Massachusetts, held the defendant barred from pleading the statute of limitations because it had offered the plaintiff an extension of time beyond the statutory period if the plaintiff would forbear bringing suit, which the plaintiff did. To like effect are the decisions in *Bewley* v. *Power*, Hayes & Jones Exchequer Reports 368 (1833); *Lade* v. *Trill*, 6 Jur. 272 (1842); *Warren* v. *Walker*, 23 Me. 453 (1844). An example of a modern application of the principle is contained in *Howard* v. *West Jersey & S. S. R. Co.*, 102 N. J. E. 517, 141 A. 755 (1928), aff'd 104 N. J. E. 201, 144 A. 919 (1929), where the principle was summarized as follows (p. 757 of 141 A.):

"It must be recognized that the statute of limitations is for the benefit of individuals, and not to secure general objects of policy; hence it may be waived by express contract or by necessary implication, or its benefits may be lost by conduct invoking the established principles of estoppel *in pais*."

Thus it is clear that, as a general and well-established principle of law, a debtor will not be permitted to plead the statute of limitations against a creditor who has refrained from bringing suit in reliance on the debtor's promise not to plead the statute, made after the debt had matured but before the statutory period had expired, and

who thereafter brings suit promptly upon learning of the debtor's inability or refusal to pay.*

When such a situation exists, as it does in the present case, what circumstances can there be to prevent the application of the rule which the courts have uniformly applied and which simple justice requires? What reason can petitioner give, in the face of the basic principle, which petitioner does not deny, to justify its attempt to escape liability for payment of the just debt which it owes and as to which it presents no defense on the merits?

There are two lines of argument which petitioner adopts in its endeavor to prevent application to this case of the fundamental rule stated above. The first is that the Interstate Commerce Act, in Section 16 (3) (a) of which the limitation here in question is contained, shows on its face that that limitation was intended to operate so as to destroy completely a carrier's right to recover its charges after the expiration of the limitation period, irrespective of any waiver or agreement between the parties. The second line of argument adopted by peti-

* The situation here under consideration, *i. e.*, where a debtor induces his creditor to forbear bringing suit prior to the expiration of the statutory period, by making, after the debt has matured but before the statute has expired, a written promise not to plead the statute of limitations, and where the creditor thereafter promptly brings suit upon learning of the debtor's inability or unwillingness to pay his debt, is to be distinguished from other types of situations with respect to which the courts have differed, as, for example, where the debtor promised, as part of his original obligation, *never* to plead the statute of limitations, which some courts have held to be contrary to the policy of the statute, or where the debtor's promise not to plead the statute was made after the statutory period had expired and without sufficient consideration, or where the promise was oral and a question was raised under the statute of frauds. There has also been some discussion in the authorities as to whether a valid waiver of the statute of limitations is to be held good for an indefinite period of time or for the statutory period, running from the time of the waiver, or for a reasonable period. See discussion in Wood on Limitations, *supra*, Sec. 76, Williston on Contracts, *supra*, Sec. 183, and note in 30 Columbia Law Review, 383. The cases are practically unanimous, however, that where there is an agreement like that in the case at bar, and similar attending circumstances, the debtor will not be permitted to plead the statute in repudiation of his agreement.

tioner is that the policy of the Interstate Commerce Act, viz., to prevent unjust discriminations and undue preferences and prejudices among shippers, requires that a waiver of the statute of limitations by a shipper, such as that contained in this case, should be held invalid and the carrier should be barred altogether from collecting its charges after the expiration of the statutory period, regardless of any agreement to the contrary between the carrier and the shipper. Respondent submits that neither of these lines of argument is adequate to prevent application to this case of the basic and elementary rule, that a debtor will not be permitted to escape his just debt by causing his creditor to forego suit within the statutory period, upon the debtor's promise not to plead the statute of limitations, and then repudiating that promise.

II. There Is Nothing, Either on the Face of or in the History of the Provision of the Interstate Commerce Act Limiting the Time Within Which Suits by Carriers to Recover Their Charges May Be Brought, Which Indicates that a Valid Waiver of Such Limitation for a Reasonable Period of Time May Not Be Agreed upon Between the Carrier and the Shipper.

At the outset it is important to point out, contrary to petitioner's contention, that this case does not fall within the line of cases holding that the fact that a cause of action wholly created by statute is subject to a limitation period imposed by the same statute is presumed to indicate a legislative purpose that the limitation shall be regarded as a condition of the cause of action itself, which is therefore destroyed upon the expiration of the statutory limitation period, with the result that the limitation period cannot be extended or waived by agreement of the parties. Among numerous cases in which that principle has been stated, the following may be cited as illustrations: *The Harrisburg*, 119 U. S. 199, 7 S. Ct. 140 (1886):

U. S. ex. rel. Texas Portland Cement Co. v. *McCord*, 233 U. S. 157, 34 S. Ct. 550 (1914); *Partee* v. *St. Louis & S. F. R. Co.*, 204 Fed. 970 (C. C. A. 8th, 1913); *McNutt* v. *Bakewell*, 223 Pa. 364 (1909). The reason for the principle is plain. Where the legislature has in the same statute created a wholly new cause of action unknown to the common law, and has provided a remedy by which that cause of action may be asserted, but has limited the period for doing so, it may ordinarily be assumed that the legislature intended the limitation to be an indispensable condition of the cause of action, which should not under any circumstances be asserted after the expiration of the statutory period.* That assumption is of course not made where it appears that the legislature had no such intent but on the contrary intended the limitation to be, like other statutes of limitation, merely a statute of repose, for the protection of the defendant: *Hill* v. *Hesse*, 126 Cal. A. 171, 15 P. (2d) 526 (1932). In such a case the limitation is said not to destroy the right but merely to bar the remedy, and it is therefore, like other statutes of limitation, capable of being "waived," in appropriate circumstances.

But in any event, this principle is limited to cases where the cause of action to which the limitation applies is created by the same statute, and it therefore has no application in a case where the cause of action is not created by that statute or by any statute but is founded on common law rights. The latter situation exists in the present case. A carrier's right to recover from the shipper the freight charges due the carrier for its transportation sevices is founded not upon the Interstate Commerce Act but upon the contract of carriage between the parties and their common-law rights and obligations thereunder. In this respect the present situation is to be sharply distinguished from a case in which the suit is *by the shipper*

* Common examples are the wrongful death statutes, the workmen's compensation acts, acts which give consent to sue the government, such as the Court of Claims Act, etc.

against the carrier alleging that the charges claimed by the carrier are unreasonable or not in accord with the carrier's published tariffs, since in the latter type of case the shipper's claim is created by and arises out of the Interstate Commerce Act.

A. A Carrier's Cause of Action for the Recovery of Freight Charges Due It for Its Transportation Services Is Based Not Upon the Interstate Commerce Act but Upon the Contract of Carriage and the Carrier's Common-Law Rights Thereunder.

That a cause of action to recover freight charges due to a carrier for transportation services performed by it (as distinguished from actions by shippers against carriers claiming the carriers' charges to be unreasonable or not in accord with their published tariffs) is not derived from or based upon the Interstate Commerce Act, is evident from an examination of the Act itself.

One of the principal purposes of the Interstate Commerce Act was to guard against unjust discriminations and undue preferences among shippers. For the accomplishment of this purpose, the Act requires carriers to publish tariffs stating the amounts of their charges and the terms on which their services are offered, and it forbids the carriers to depart from the provisions of those tariffs (Section 6). In accordance with this purpose, it not only makes it unlawful for a carrier to depart from the provisions of its tariffs but it gives the shipper a cause of action to recover any amount charged by the carrier in excess of the amount fixed by its published tariffs (Section 8). The Act likewise prohibits carriers from charging more than reasonable rates, and gives the shipper a cause of action for recovery of amounts in excess of reasonable rates as determined in proceedings before the Interstate Commerce Commission (Sections 1 and 8). Thus, the question as to what is a proper *amount* for the carrier to charge for its transportation services is very

fully and completely regulated by the Interstate Commerce Act and the administrative machinery set up thereunder, and the Act creates and is itself the source of liability on the part of the carrier to the shipper with respect to amounts charged by the carrier in excess of the amount thus fixed under the terms of the Act as the proper amount.

Nowhere in the Act, however, is there a provision which creates for the carrier a cause of action or right of recovery for the charges lawfully due it for its transportation services, or which specifies how those charges shall be collected. There is not a word in the Act on that subject,* and the carrier's right to recover its lawful charges and its remedies to enforce that right are obviously based not upon the Act but upon the contract of carriage between the carrier and the shipper and the respective common-law rights and obligations of the parties thereunder. Where, as is the case here, the carrier is confronted with the necessity of proceeding to collect the charges due it for its transportation services, and where, as here, the charges are undisputed in amount† and there is no question as to their reasonableness or their being in accord with the published tariff rates, the carrier is left by the Act entirely to its common-law rights and remedies, based on its contract of carriage with the shipper.

The fact that a carrier's cause of action to recover the

*The fact that the carrier's basic right to recover its lawful charges is founded not upon the Interstate Commerce Act but upon the contract of carriage is not altered by the provisions of Sec. 3 (2) of the Act, providing for liability or nonliability in certain special types of cases, as, for example, where a consignee is merely agent and not the beneficial owner, and it is accordingly provided that he shall not be liable for additional after-discovered charges. None of the special situations there specified is involved in the present case, and there can be no question that the liability of petitioner herein for the charges in question is based not upon the Interstate Commerce Act but upon petitioner's contract of carriage.

†The amounts of the charges due to respondent were stated in the agreement of waiver between petitioner and respondent (R. 40), and are admitted by petitioner's pleadings (R. 2 *et seq.* and 51 *et seq.*), so that there is no question as to the propriety of the amounts of those charges.

charges which are due it for its transportation services is founded not on the Interstate Commerce Act but on the contract of carriage between the carrier and shipper is clearly established by the cases. Thus, in *Louisville & N. R. Co.* v. *Central Iron & Coal Co.*, 265 U. S. 59, 44 S. Ct. 441 (1924), the carrier brought suit against the apparent consignor of a shipment, to collect certain charges due it under the legally applicable tariff rate. The question was whether or not the defendant, who was not the actual owner of the shipment at the time of its delivery to the carrier, was the proper party to pay the charges in question, and in determining that question the Supreme Court held that it must look to the contract of carriage. Speaking through Mr. Justice Brandeis, this Court said (pp. 65-67 of 265 U. S.):

> "The shipment being an interstate one, the freight rate was that stated in the tariff filed with the Interstate Commerce Commission. The *amount* of the freight charges legally payable was determined by applying this tariff rate to the actual weight. Thus they were fixed by law. *No contract of the carrier could reduce the amount legally payable*, or release from liability a shipper *who had assumed an obligation to pay the charges*. * * * But delivery of goods to a carrier for shipment does not, under the Interstate Commerce Act, impose upon a shipper an absolute obligation to pay the freight charges. *The tariff did not provide when or by whom the payment should be made. As to these matters carrier and shipper were left free to contract*, subject to the rule which prohibits discrimination. * * * Nor does delivery of goods to a carrier necessarily import, under the general law, an absolute promise by the shipper to pay the freight charges. We must, therefore, determine *what promise, if any, to pay freight charges was, in fact, made by the Central Company.*" (Emphasis supplied.)

Thus, this Court said in that case, in the plainest possible language, that the question as to who is liable to pay the charges lawfully due a carrier for its transportation services is one which is determined not by any of the provisions of the Interstate Commerce Act but by the contract of carriage between the parties. It follows that the carrier's cause of action to recover such charges is based not upon the Act but upon the obligation of the shipper expressed in the contract.

The point has been particularly well stated in a recent decision of the Supreme Court of Illinois, *Alton R. Co.* v. *Gillarde*, 379 Ill. 308, 40 N. E. (2d) 727 (1942). In holding in that case that the carrier was entitled to recover its charges from the party who was in effect both consignor and consignee, under the terms of the bill of lading, the court said (pp. 313-14 of 379 Ill.):

> "It has been repeatedly held that while the rights and liabilities of shippers as to the *rates and amounts* of the charges made are governed by the Federal laws relating to interstate commerce, as interpreted by the Federal courts, *still the Interstate Commerce Act does not purport to determine upon whom the liability to pay transportation charges shall fall. This is a matter of contract in no way controlled by the Interstate Commerce Act.* In *Houston & T. C. Ry. Co.* v. *Lee County Produce Co.*, D. C., 14 F. 2d 145, 157, it was said, 'It cannot be reasonably contended that laws and regulations designed to prevent discrimination between shippers have developed a new series of contractual rights, or disturbed old concepts of wrong; these laws merely prevent railroads carrying freight for one on better terms than for another.' Many other cases might be cited to the same effect. *The Interstate Commerce Act is not concerned with who shall pay the transportation charges.* It permits the carrier to make any contract it may see fit with reference to who shall pay the charges. Its only purpose

is to prevent discrimination and rebates. It prohibits the application of any act or conduct as estopping a carrier from exacting the lawful freight rate. Its purposes are obvious. It has no application to the facts in this case." (Emphasis supplied.)

To like effect is the decision of the Supreme Judicial Court of Massachusets in *Pennsylvania R. Co.* v. *Lord and Spencer*, 295 Mass. 179, 3 N. E. (2d) 231 (1936). In that case the carrier sued to collect its freight charges, as to the amount of which there was no dispute, the only question being whether or not the defendant was the proper party to pay the charges. Speaking through Mr. Chief Justice Rugg, the Massachusetts court said (pp. 181-82 of 295 Mass.):

> "This is an action to recover charges for transportation in interstate commerce. Therefore the issues of law must be decided according to statutes of the United States so far as applicable. *Where not governed by such statutes, the rights of the parties depend upon the principles of the common law. The Federal statutes impose no obligation upon a particular party to pay charges for transportation. 'As to these matters carrier and shipper were left free to contract, subject to the rule which prohibits discrimination.' Louisville & Nashville Railroad Co.* v. *Central Iron & Coal Co.*, 265 U. S. 59, 44 S. Ct. 441, 442, 68 L. Ed. 900; *American Railway Express Co.* v. *Mohawk Dairy Co.*, 250 Mass. 1, 6, 144 N. E. 721, 35 A. L. R. 14. See 44 U. S. Stat. 1447." (Emphasis supplied.)

Similarly, in *Pennsylvania R. Co.* v. *Fox & London, Inc.*, 93 F. (2d) 669 (C. C. A. 2d, 1938) (cert. den., 304 U. S. 566; 58 S. Ct. 949), it was said that "the Interstate Commerce Commission only has such jurisdiction as has been conferred upon it by Congress, and that does not give

it power to make orders adjudicating claims of carriers against shippers and requiring payment of such claims."

See also *Oregon-Washington R. & Nav. Co.* v. *Seattle Grain Co.*, 106 Wash. 1, 178 P. 648 (1919);* *St. Louis Southwestern Ry. Co.* v. *Gramling*, 97 Ark. 353, 133 S. W. 1129 (1911); *Reading Co.* v. *Sobelman*, 144 Pa. Super. Ct. 270, 19 A. (2d) 754 (1941).

Of course the situation here presented, in which the carrier is suing to recover the full amount of the undisputed charges, is to be distinguished from cases like *Button* v. *Atchison, T. & S. F. Ry. Co.*, 1 F. (2d) 709 (C. C. A. 8th, 1924);† and *Wisconsin Bridge and Iron Co.* v. *Illinois Terminal Co.*, 88 F. (2d) 459 (C. C. A. 7th, 1937),† cited by petitioner, which involve suits by carriers, brought after the originally billed charges have been paid, to recover *additional* amounts alleged to be due under the applicable tariffs, where the right of the carrier to recover such additional amounts flows directly from specific provisions of the Interstate Commerce Act. To the extent that the Texas district court in *Galveston H. & S. A. R. Co.* v. *Webster Co.*, 27 F. (2d) 765 (W. D. Tex., 1928),† used loose language, not necessary to its decision, to the effect that a carrier's cause of action to recover its full undisputed charges is created by the Interstate Commerce Act, that court was clearly wrong, for the reasons already stated.

Thus, it is clear both from the face of the Interstate Commerce Act itself and from the cases that the cause of action on which the present suit is founded was not created

* In that case the court said (p. 650 of 178 P.):

"A liability created by statute is one in which no element of agreement enters. It is an obligation which the law creates in the absence of an agreement. But the present liability is not of this sort. The law but fixes the rate to be charged when a contract of carriage is made. In other words, the law does not create the liability; it but determines the amount of the liability created by the express contract of the parties. *As such it is not a liability created by statute. It is a liability arising out of the contract which the parties have by their writing expressed.*" (Emphasis supplied.)

† These cases are more fully discussed below, at pp. 64-68.

by the Interstate Commerce Act or by any other statute but is based upon the carrier's common-law rights growing out of the contract of carriage, *i. e.*, upon the shipper's express promise, as contained in the bill of lading, to pay the charges. Therefore the case does not fall within the line of cases holding that the fact that a cause of action created by statute is subject to a limitation period imposed in the same statute indicates a legislative intent that the cause of action shall be destroyed upon the expiration of the limitation period.

In this respect the case is to be sharply distinguished from the decisions of this Court upon which petitioner chiefly relies and which will be more fully discussed below (pp. 53 *et seq.*), viz., the decisions in *A. J. Phillips Co. v. Grand Trunk Western Ry. Co.*, 236 U. S. 662, 35 S. Ct. 444 (1915), and cases following it, such as *Kansas City Southern R. Co. v. Wolf*, 261 U. S. 133, 43 S. Ct. 259 (1923). In the *Phillips* case the suit was by a shipper against the carrier to recover damages for the charging of unreasonable rates, and was based on a finding by the Interstate Commerce Commission that the rates in question were unreasonable. There could be no doubt that the shipper's cause of action in that case was one which was created by and founded upon the Interstate Commerce Act. In the *Kansas City Southern* case, the suit was again by a shipper against the carrier, alleging that the charges collected by the carrier were in excess of the amount lawfully determined in accordance with the published tariff rates. Again the cause of action was one which was based upon the Interstate Commerce Act, since it turned on a question as to the amount of charges due under the tariffs which the Act required the carrier to publish and from which it prohibited any departure (see above, pp. 19-22). Those cases and others like them therefore do not advance the petitioner's contention that the carrier's cause of action in the present case is created by the Interstate Commerce Act. Furthermore,

the decision of this Court in those cases, to the effect that the statutory cause of action was destroyed upon the expiration of the limitation period, was rested not upon the fact that the cause of action and the limitation were contained in the same statute but upon reasons of policy which, as will be shown below (pp. 37-50), have no application to the present case.

B. THERE IS NOTHING IN THE LANGUAGE OF THE PROVISION LIMITING SUITS BY CARRIERS TO RECOVER THEIR CHARGES, WHICH INDICATES THAT A PROMISE NOT TO PLEAD IT SHALL NOT BE VALID AND BINDING.

The limitation period upon which petitioner relies in this case is contained in Section 16 (3) (a) of the Interstate Commerce Act, which, at the time the shipments here in question moved, provided as follows (43 Stat. 633):

> "All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after."

Petitioner contends that the phrase "and not after" in this provision manifests a Congressional purpose to destroy completely, after the expiration of the three-year period, the carrier's common-law right to recover the charges lawfully due it for its transportation services, and to make impossible any waiver of the limitation. In this respect petitioner seeks support from language used in the opinion of this Court in *A. J. Phillips Co.* v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662, 35 S. Ct. 444 (1915). As already pointed out above (p. 24), the decision in that case, which involved a suit by a shipper based on a finding of the Interstate Commerce Commission that the carrier's rate was unreasonably high, can have no application to the present case, because the cause of action there involved was one which was created by the Interstate Commerce Act, while the cause of action in the present case is founded upon the carrier's common-law rights under its

contract of carriage, and also because the ground of the decision in the *Phillips* case consisted primarily of reasons of policy which have no application to the present case. Moreover, there was no question in that case as to any "waiver" of the statutory limitation or promise not to plead it, and the case therefore decided nothing with regard to the validity of such a waiver or promise.

The shipper's suit in the *Phillips* case was brought after the expiration of the two-year limitation period provided in the Interstate Commerce Act for suits of that character, and this Court, in holding quite properly that the suit was barred by the limitation, addressed itself to an argument that the local state practice which governed the case did not permit the defense of the statute of limitations to be raised under a general demurrer. This argument the Court rejected on the ground that the cause of action on which the shipper sued was one which was completely destroyed upon the expiration of the limitation period. In taking that position, the Court, speaking through Mr. Justice Lamar, made the following remark (p. 667 of 236 U. S.):

> "But that rule [*i. e.*, the rule that the defense of the statute may not be raised by a general demurrer] does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years *and not after*. Under such a statute the lapse of time not only bars the remedy but destroys the liability (*Finn* v. *U. S.*, 123 U. S. 227, 232) whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction."

It is apparent from reading the opinion as a whole that this remark as to the significance of the words "and not after" was purely *obiter dictum*, because the opinion goes on to rest its conclusion in this respect primarily on the point that discrimination would be made possible, con-

trary to the policy of the Act, if it were not held that the shipper's cause of action was completely destroyed upon the expiration of the limitation period.* Furthermore, Mr. Justice Lamar's remark, regarding the significance of the phrase "and not after," was apparently made in disregard or in unawareness of the history of that phrase.

Before considering the history and significance of the phrase "and not after," it is important to distinguish the case cited by Mr. Justice Lamar in this connection in the passage quoted above, viz., *Finn* v. *U. S.*, 123 U. S. 227, 8 S. Ct. 82 (1887). That was a suit against the United States, originating in the Court of Claims, for the value of property sold to the United States. The suit was brought after the expiration of the six-year period of limitation provided in the Court of Claims Act, and the Supreme Court held, quite properly, that the general rule permitting waiver of the statute of limitations had no application to suits in the Court of Claims against the United States, since the Government had not conferred authority upon any of its officers to waive the limitation provision, and since the Government could not in any event be sued without its consent, and its consent, as given in the Court of Claims Act, was expressly conditioned upon the bringing of the suit within the six-year period specified in the Act. Plainly, that case has no relevance or application to the situation presented in the case at bar.

To return to the phrase "and not after," it is clear from an examination of statutes of limitations generally and the decisions applying them that, contrary to petitioner's contention and to Mr. Justice Lamar's statement in the *Phillips* case, the phrase has no significance on the issue here presented, viz., whether or not the limitation provision can be waived, and does not distinguish the limitation provisions contained in the Interstate Commerce Act from general statutes of limitation. Investigation shows that the phrase is as old as statutes of limitations

* This point is more fully discussed below, at pp. 37-50.

themselves. It appeared not less than five times in the earliest English general statute of limitations,* which was the statute of 21 James I. c. 16 (1623), known as "The Limitation Act.† But the use of that phrase in the gen-

* The phrase "and not after" appeared in an even earlier statute of limitations, that of 31 Eliz. c. 5, enacted in 1589, which was primarily a limitation on penal actions, and which provided that such actions should be brought "within two years next after the offence committed or to be committed against such act penal, *and not after* two years." (Emphasis supplied.) (7 Chitty's English Statutes, 6th Ed., pp. 618-19.) Other early statutes of limitations, such as the statute of Merton, 20 Hen. III. c. 8 (1235), and the statute of 32 Hen. VIII. c. 2 (1540), were confined to limitations upon actions involving real property (see Coke's Second Institutes 94-96). The latter statute contained the following language (see Angell on Limitations, 6th Ed., Appendix, p. 504):

> "All formedons in reverter, formedons in remainder, and *Scire facias*, upon fines of any Mannors, Lands, Tenements, or other Hereditaments shall bee sued and taken within fiftie years next after the title and cause of action fallend, *and at no time after* the said fiftie yeares passed." (Emphasis supplied.)

† "All actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action *sur* trover and replevin for taking away of goods and cattle, all actions of account, and upon the case (other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants) all actions of debt, grounded upon any lending or contract without specialty, all actions of debt for arrearages of rents, and all actions of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, *and not after* (that is to say), the said actions upon the case (other than for slander), and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit* within three years next after the end of this present session of parliament, or within six years next after the cause of such actions or suit, *and not after;* and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within one year next after the end of this present session of parliament, or within four years next after the cause of such actions or suit, *and not after;* and the said actions upon the case for words within one year after the end of this present session of parliament, or within two years next after the words spoken, *and not after.*

"And nevertheless be it enacted, that if in any the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill, or if any the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his heirs, executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff or outlawry reversed, *and not after.*" (Emphasis supplied.) (7 Chitty's English Statutes, 6th Ed., pp. 619-25.)

eral statute of limitations did not prevent the English courts from establishing, as a basic principle of the common law, that general statutes of limitations do not operate to destroy the liability but on the contrary constitute merely a personal defense which may be waived either by failure properly to plead it or by a binding promise not to plead it. The question whether or not the limitation enacted by such a statute could be validly waived by a debtor's promise not to plead it was squarely raised in a case in the Court of Exchequer in Ireland in 1833. A limitation act embodying the same provisions, in almost identical language, and including the phrase "and not after" in the same contexts as in the statute of 21 James I, was enacted for Ireland in 10 Charles I. c. 6 (1634), and thereafter remained in substance the general statute of limitations for Ireland (2 Irish Statutes, pp. 54-55; see the recital clause in the Statute of Frauds Amendment Act, 9 Geo. IV. c. 14 (1828), known as "Lord Tenterden's Act," 7 Chitty's English Statutes, 6th Ed., pp. 629-32). In *Bewley* v. *Power*, Hayes & Jones Exchequer Reports 368 (1833), the plaintiff had refrained from bringing suit prior to the expiration of the six-year statutory period, and in so refraining had relied on a letter from the defendant in which the latter stated he would not plead the statute of limitations. Suit having been brought after the expiration of the statutory period, the Irish Court of Exchequer held that the defendant was bound by his letter and that the plaintiff should have judgment for the amount of the note. It was not even contended that the phrase "and not after," which qualified the limitation period applicable to the plaintiff's claim under the statute, operated to destroy the plaintiff's cause of action at the expiration of the statutory period or to prevent the debtor from being bound by his promise not to plead it.

The same phrase appears in many state statutes of limitations, and numerous cases have nevertheless held waivers of the limitation under such statutes valid. Thus,

in *Quick* v. *Corlies*, 39 N. J. L. 11 (1876), the New Jersey court pointed out that "this obligation being under seal, the action upon it must be commenced within sixteen years next after the cause of action shall have accrued, *and not after*, by the statutes of limitation of our state." (Emphasis supplied.) And yet the court went on to say, with regard to that statute of limitations:

> "This statute, limiting a time within which action shall be brought, is for the benefit and repose of individuals and not to secure general objects of policy or morals. Its protection may, therefore, be waived by those who assent in legal form, and when acted upon, such waiver becomes an estoppel to plead the statute."

The court then went on to hold that the waiver of the statute of limitations in that case was valid and that the suit could be maintained despite the fact that it was brought following the expiration of the statutory period.

Similarly, in Michigan, waivers made with respect to limitation provisions containing the phrase "and not after" (Mich. Comp. Laws, 1871, Sec. 7148, and Mich. Ann. Stat., 1938, Sec. 27.605) have been held valid and binding: *Crane* v. *Abel*, 67 Mich. 242, 34 N. W. 658 (1887); *In Re Estate of King*, 94 Mich. 411, 54 N. W. 178 (1892). To like effect are *Dickson* v. *Slater Steel Rig Co.*, 138 Okla. 238, 280 P. 817 (1929), arising under similar statutory provisions in Oklahoma,* and *Smith* v. *Dupree*, 140 S. W. 367 (Ct. Civ. App. Tex., 1911), arising under similar statutory provisions in Texas.†

Petitioner in its brief in this Court (p. 26), in referring to this phrase "and not after," states that "It is universally known that the language in which a statute of limitations is ordinarily couched does not include the

* Okla. Rev. Laws 1910, Sec. 4657, and Okla. Ann. Stat., Tit. 12, Sec. 95.

† Tex. Rev. Stats. 1895, Art. 3356, Tex. Rev. Civ. Stat. 1925, Art. 5526.

above quoted phrase." Petitioner obviously did not examine many statutes of limitations, if it examined any. The phrase "and not after" or substantially similar phrases appear in a great many statutes of limitations, among which the statutes of the following states may be cited as examples, in addition to those referred to above: Alabama, Arizona, Arkansas, Colorado, Indiana, Mississippi, New Hampshire, New Mexico, Rhode Island, Vermont, Virginia.*

From this review of the authorities it is plain that there is nothing distinctive or decisive in the phrase "and not after," as used in the limitation provisions of the Interstate Commerce Act. The only significance which the phrase has either in that Act or in any of the many statutes of limitations in which it occurs is merely that it is an express statement of the statute's purpose to set up a bar to suits brought after the expiration of the statutory period. The phrase does not operate to prevent the bar of the statute from being regarded as a personal defense which may under proper circumstances be waived, and no case is known which has ever held that the phrase does so operate in any of the many statutes of limitations in which it occurs, excepting only Mr. Justice Lamar's *obiter* statement, made without any supporting authority and apparently without any examination of the history of the phrase or any indication of awareness that it occurred in many other general statutes of limitations which were nevertheless construed to be subject to waiver. For the reasons already indicated, that statement regarding the phrase "and not after" should be disregarded as unfounded and without warrant.

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* Ala. Code, 1940, Tit. 7, Sec. 18; Ariz. Code, 1939, Secs. 29-203, 29-205, 29-206; Ark. Pope's Digest of Stats., 1937, Ch. 102, Secs. 8928, 8933; Colo. Ann. Stats., 1935, Ch. 102, Sec. 1; Ind. Burns' Ann. Stats., 1933, Secs. 2-601, 2-602; Miss. Code, 1930, Ch. 45, Sec. 2299; N. H. Rev. Laws, 1942, Ch. 385, Pars. 3, 4; N. M. Stats., 1941, Sec. 27-101; R. I. Gen. Laws, 1938, Ch. 510, Sec. 3; Vt. Pub. Laws, 1933, Ch. 72, Sec. 1648; Va. Code, 1942, Sec. 5810.

C. THERE IS NOTHING IN THE LEGISLATIVE HISTORY OF THE PROVISION LIMITING SUITS BY CARRIERS TO RECOVER THEIR CHARGES, WHICH INDICATES AN INTENT THAT A PROMISE NOT TO PLEAD THE LIMITATION SHALL NOT BE VALID AND BINDING.

Petitioner in its brief treats all the limitation provisions of the present Paragraph (3) of Section 16 of the Interstate Commerce Act as if they were all enacted together and originated in the same statute. This is far from being the case.

The limitation provision specifically involved here, viz., Section 16 (3) (a), applicable to suits by carriers to recover freight charges, was first enacted as part of the Transportation Act of 1920 (Act of February 28, 1920, c. 91, sec. 424, 41 Stat. 491-92). The other limitation provisions of Section 16 (3), including those which are successors of the provision involved in the *Phillips case*, have a different history. In order to understand the purpose and intent of the provision here involved (Section 16 (3) (a)), it is necessary to examine its history and its relationship to the other provisions with which it is now associated in the same sub-section of the Act.*

Prior to the Transportation Act of 1920, there had existed as a result of the enactment of the Hepburn Act of June 29, 1906 (34 Stat. 590), a limitation upon suits by shippers against carriers for recovery of damages in proceedings before the Interstate Commerce Commission and in court proceedings to enforce certain orders of the Commission. But the only limitations applicable to suits by carriers to recover their charges were those provided in the state statutes of limitations. Suits by carriers to recover their charges could then, as now, be brought, like other suits upon contracts, in the state courts, and prior to the Transportation Act of 1920 such suits

* Section 16 (3) first took its present form, with subdivisions designated (a), (b), (c), etc., in the amendment enacted by the Act of June 7, 1924, 43 Stat. 633.

were governed by the state statutes of limitations, just as other contract actions were so governed. Because of this, there existed a situation which presented the possibility of unfairness. By virtue of the limitation provisions enacted by the Hepburn Act of 1906 and applicable to suits by shippers for the recovery of damages, a complaint or suit by a shipper to test the reasonableness of the carrier's rate or its applicability under the published tariffs could be brought only within a period of two years following accrual of the shipper's cause of action. The carrier, however, was not barred from suing to recover its charges until the expiration of a much longer period, generally six years, as fixed in the applicable state statute of limitations. Accordingly, it was possible for a shipper from whom the carrier through mistake or inadvertence had not claimed the freight charges before the expiration of two years, to find himself confronted with a suit by the carrier for recovery of the charges, after it was too late for him to test the reasonableness of the rate which he would then be obliged to pay.

This situation was recognized by the Interstate Commerce Commission, and it was because of this situation, and only for that reason, that the Commission began to recommend, in its Annual Report for 1913, and continued thereafter to recommend, that Congress impose a limitation on suits by carriers to recover their charges which would be the same in period of time as the limitation on suits by shippers to test the propriety of the charges, so as to eliminate the possibility of unfairness described above. Thus, in its report for 1913, the Commission made the following recommendation (pp. 80-81):

> "In the present state of the law the statute of limitations for the beginning of proceedings by shippers to recover reparation on account of unreasonable rates is fixed at two years. The statute of limitations for the initiation of criminal prosecutions by the Federal authorities for failure to collect or to pay

the full amount of legally established transportation charges is three years. The statutes of limitations for the beginning of actions by carriers to recover unpaid transportation charges from shippers are provided by the several States and vary in the different States. Generally, however, they provide longer periods than is provided in the act to regulate commerce.

"From this instances of gross injustice result. Through inadvertence carriers sometimes fail to present bills to shippers for the legal amount of freight charges due. Such errors are discovered more than two years after the shipment has been delivered and all causes of action thereunder have accrued. The shipper thus finds himself liable to prosecution for failure to pay the legal rate, but, owing to the two-year statute of limitations, he is barred from beginning a proceeding to test the reasonableness of the charges assessed against him.

"We therefore recommend providing one period for beginning of all actions relating to transportation charges subject to the act. A provision should be made that all actions by carriers subject to the act for the recovery of compensation for any service subject to the act shall be begun within three years from the completion of such service, and that all complaints for the recovery of damages shall be filed with the Commission within three years from the completion of the service as to which damages are claimed, and not after."

This recommendation was repeated in subsequent annual reports of the Commission, and was again urged by Mr. Commissioner Clark, for the same reasons, in the hearings before the House Committee on Interstate and Foreign Commerce, held in September and October, 1919, on the bill which ultimately became the Transportation Act of 1920 (Hearings before House Committee on Interstate

and Foreign Commerce, 66th Congress, First Session, on H. R. 4378, pp. 2898-99).* As a result of these recommendations, the Transportation Act of 1920 included a three-year limitation on suits brought by carriers to recover their charges (see pp. 6, 32 above). While this limitation did not conform to the two-year limitation, which was retained, on suits by shippers, and therefore did not follow exactly the recommendation of the Commission, the purpose which the Commission had in mind was accomplished by the addition, likewise in the Transportation Act of 1920 (41 Stat. 491-92), of another provision, now known as Section 16 (3) (d) of the Interstate Commerce Act, which provided that where suit was begun by a carrier in due season for recovery of its charges, the limitation on suits by shippers to test the propriety of such charges would be extended to include ninety days from the time of the beginning of the carrier's action (43 Stat. 633).†

It is thus clear that the sole purpose of the enactment by Congress, in the Transportation Act of 1920, of the three-year limitation upon suits by carriers to recover their charges, together with the provision giving shippers an additional ninety days, from the time any such suit may be begun, to test the propriety of the charges, was to eliminate the possibility which theretofore existed that a shipper might be compelled to pay a carrier's charges at a time when it was too late for the shipper to test the

* The Conference Report which accompanied the Transportation Act of 1920, as finally agreed upon by both the Senate and House conferees, showed that the limitation provision in question had its origin in the House bill and not in the Senate amendment thereto (H. R. Report No. 650, 66th Congress, Second Session). It was on the House bill that the hearings above referred to, in which Mr. Commissioner Clark made his recommendation, were held.

† These limitation provisions were finally made uniform in time by the Transportation Act of 1940, which fixed two years as the limitation period applicable to actions by carriers for recovery of their charges and to actions or complaints by shippers for recovery of damages based on alleged unreasonableness of the rate or on inapplicability of the rate under the terms of the published tariffs (54 Stat. 912-13).

propriety of those charges. That purpose contains no element which would make invalid a waiver of the three-year limitation against carriers, voluntarily agreed upon by the shipper as a result of its voluntary request for an extension of time.

Petitioner contends that the limitation on actions by carriers (Section 16 (3) (a)) should be construed in the same way in which the limitation on actions by shippers (Section 16 (3) (b) and (c)) has been construed, *i. e.*, as destroying the cause of action upon the expiration of the limitation period (see above, p. 26), for the reason that both limitation provisions are contained in the same statute. The answer to this is two-fold. In the first place, petitioner's premise is erroneous, since the two limitation provisions were not enacted in the same statute. The Interstate Commerce Act is not a single statute. It is made up of many statutes, enacted at different times over a long period of years. As already shown above (pp. 32-35), the limitation provision applicable to suits by shippers was enacted in the Hepburn Act of 1906, while the limitation on suits by carriers was first enacted in the Transportation Act of 1920. In the second place, the two limitation provisions were motivated by entirely different purposes. The limitation upon suits by shippers, enacted in the Hepburn Act of 1906, was part of a whole series of provisions designed to strengthen the statutory safeguards against unjust discriminations and undue preferences and prejudices as between shippers. On the other hand, the limitation on suits by carriers, included in the much later Act of 1920, was enacted for the specific purpose indicated above, namely, to prevent a shipper from being compelled to pay the carrier's charges at a time when it was too late for the shipper to challenge their propriety. Plainly, therefore, there is no reason to suppose that Congress intended that the two limitation provisions should be construed alike.

It follows from what has been said above that there is nothing, either in the language of the limitation provi-

sion applicable to suits by carriers to recover their charges or in the purpose for which that provision was enacted, as shown by its legislative history, which would require a departure from the basic principle that a debtor's promise not to plead the statute of limitations, made to induce the creditor to refrain from bringing suit within the statutory period and relied on by the creditor in so refraining, is valid and binding on the debtor. It remains to consider petitioner's contention that the general policy of the Interstate Commerce Act, viz., to prevent unjust discriminations and undue preferences, requires that petitioner be permitted to repudiate its promise and thus altogether escape payment of the charges for which it is plainly liable on the merits.

III. There is Nothing in the Policy of the Interstate Commerce Act Which Requires that a Voluntary Agreement Made by a Shipper Not to Plead the Statute of Limitations Should Not be Enforced.

The final argument upon which petitioner's position appears to rest is that to hold petitioner to its agreement not to plead the statute of limitations would provide a device whereby it would be possible for carriers to commit unjust discriminations and bestow undue preferences among shippers, contrary to the policy and provisions of the Interstate Commerce Act. This is a startling argument for petitioner to make. Petitioner, having voluntarily requested respondent to grant it an extension of time purportedly for the purpose of investigating respondent's request for payment of the transportation charges, and having voluntarily agreed, for the purpose of obtaining such an extension, to refrain from pleading the statute of limitations, now seeks to repudiate its agreement on the ground that that agreement if valid would make possible acts which would be harmful to it as a shipper and to others of the same class, contrary to the provisions of the Interstate Commerce Act. Thus peti-

tioner in effect contends that it should not be compelled in this case to pay the charges which are lawfully due from it to the carrier, and which all other shippers in like position would be obliged to pay, because harm might thereby result to shippers as a class. The argument is an extraordinary one. Petitioner in effect charges that it has been treated with unlawful favoritism, and it therefore claims that it is entitled to be still more favored.

This is an argument without merit. In the first place, no question can arise of an actual discrimination or preference contrary to the provisions of the Interstate Commerce Act, under the circumstances of the present case. All that petitioner is here being asked to do is to pay the charges which it owes to respondent, and which all other shippers in petitioner's position would be required to pay. There is no question of any rebate or other undue advantage being given to petitioner or of any unjust discrimination or undue prejudice against petitioner. On the contrary, failure to hold petitioner to its promise and failure to require it to pay the charges which it owes would result in an actual unjust discrimination against other shippers and an undue preference in favor of petitioner, contrary to the principal purpose of the Interstate Commerce Act and in violation of its provisions, because petitioner would thereby be permitted to escape payment of the lawful charges for transportation services rendered to it as consignor, consignee and actual owner of the shipments in question.

That such a result is condemned by the Interstate Commerce Act is made clear by several of the cases cited by petitioner herein. For example, in *New York, N. H. & H. R. Co.* v. *California Fruit G. Exch.*, 125 Conn. 241, 5 A. (2d) 353 (1939) (cert. den. 308 U. S. 567, 60 S. Ct. 79), the Connecticut court, in holding that the carrier was entitled to recover its charges from the defendant, who was consignor, consignee and owner of the shipments, despite the fact that the carrier had delivered the shipments to

another party designated by the defendant without complying with defendant's instructions to collect the freight charges from such other party, quotes the following language (p. 357 of 5 A. 2d) from the case of *Central of Georgia Ry. Co.* v. *Birmingham Sand & Brick Co.*, 9 Ala. App. 419, 425, 64 So. 202, 204 (1913), as follows:

> "'The necessary effect of all [the] decisions, construing and applying the Interstate Commerce Act, when considered together, is * * * that the carrier cannot, by any act estop itself from exacting the lawful freight rate. *If the carrier could so estop itself, then it would lie within the carrier's power, by purposely putting itself in a position where it could not exact the lawful rate of a shipper it desired to favor, to render nugatory one of the main designs of the act—the prevention of discrimination between shippers;* and for the law to countenance the doctrine of estoppel in cases like this is for the law to say, through the courts, that the carrier is estopped from doing what the statute mentioned plainly requires that it must do—collect the lawful rate in all cases, and nothing greater and nothing less, by any means or device whatsoever.'" (Emphasis supplied.)

Similarly, in *Chicago & N. W. Ry. Co.* v. *J. I. Case Plow Works*, 173 Wis. 237, 180 N. W. 846 (1921), another case cited by petitioner, it was said (p. 847 of 180 N. W.):

> "Unlawful acts of a carrier's agents in connection with charging and collecting the legal rates for transportation *cannot be made the foundation of an estoppel to prevent the carriers from enforcing the legal rate against those liable therefor.*" (Emphasis supplied.)

In other words, if petitioner's contention in this case prevails, then this Court, in so holding, will make possible

an actual commission of the very thing which Congress was at such pains to prevent, viz., the carriage of freight without the payment by the shipper of the freight charges lawfully due from it for such carriage.

The Supreme Court of California in its decision in the present case has aptly stated the matter in the following language (R. 203-04):

> "If we assume that the forebearance by the carrier under the written waiver of the shipper was a preference, and that the question is pertinent in this case, it does not follow that the forebearance under the circumstances was either forbidden or unreasonable. The main purpose of the agreement was not to extend credit to the defendant, but was to preserve the rights of the carrier. There is no justification for a conclusion that under the facts in this case the purpose was abused as a cover for extending an unreasonable preference. Moreover, the remedy for the giving of an unreasonable preference is the recovery of damages by the person discriminated against and who has been injured thereby. (Sec. 8, Interstate Commerce Act, 49 U. S. C. A.) An example is *Gamble-Robinson Commission Co.* v. *Chicago, N. W. Ry. Co.*, 168 F. 161, where an action was brought by a shipper who had not received the same credit terms accorded other shippers. The court said in that case that the Commerce Act left the carrier free to exercise all the rights and privileges under the common law insofar as they were not rendered unlawful by the act; that the act did not make all preferences or advantages unlawful, and that there was nothing unreasonable in requiring prepayment of freight in the case of one shipper and in extending credit to another. *If in the present case the defendant's contention in this respect were to prevail, the result would be that the shipper who has been the recipient of the preference would be deemed injured thereby. Certainly he*

should not be heard to contend that injury to him has resulted because he is compelled to discharge his liability to pay lawful freight charges—a liability which was created when the shipments were delivered and has never been discharged. The purpose of the act is to secure equal treatment to all shippers.

"It is founded on a sound public policy. But *that policy should not permit the favored shipper to urge discrimination against others for the purpose of enabling it to escape a liability which it was otherwise bound to discharge.*" (Emphasis supplied.)

It is entirely clear that on the facts of this case there would not only be no discrimination in permitting respondent to recover, but that on the contrary, so far as concerns the parties to this suit, a real and substantial discrimination in favor of petitioner would follow from accepting petitioner's contentions.

Despite this, however, petitioner urges that if a recovery is here allowed for the plaintiff, a precedent will be established which in future cases will open the door to the possibility of discrimination. This contention is founded on an attempt to extend and apply to this case a suggestion contained in certain language of the opinion in the *Phillips* case (see pp. 56-57 below). In that language this Court said in substance that to permit a *carrier* to waive defenses against shippers would be to bestow upon railroad companies the power to favor some shippers and discriminate against others, that if would therefore confer a power of giving preferences by means of "consent judgments", and that such a power should not be permitted to exist. Petitioner contends that this argument is equally applicable to a waiver by the shipper such as is involved in the case at bar, and that to recognize the validity of a waiver by the shipper would likewise result in creating opportunities for unlawful discrimination.

That this is not the case and that petitioner's argument is unsound will appear at once from a comparison of the two different situations.

Under the type of facts and circumstances presented by the case at bar, the carrier is not surrendering or waiving any defenses, as it was in the situation considered in the *Phillips* case. On the contrary, the carrier is here preserving and pressing its right of action, and it is the shipper who is surrendering a defense. What the rule in the *Phillips* case is obviously designed to do is to prevent the carrier from deliberately and intentionally exposing itself to a recovery by a favored shipper which it declines to permit to another less favored. This is the point of the Court's remark in that case that the carrier's power of making such a waiver would be equivalent to a right to suffer a consent judgment in favor of some shippers which would be barred as against others by the statute. Such a power on the part of the carrier would put it in the position of having an undue favor to bestow, the favor consisting of the substantial amount of money to be recovered by the shipper in the action to which the carrier surrenders its defense.

This danger of substantial discrimination is altogether absent in a state of facts like those involved in the case at bar, where the waiver of defense is by the shipper. The power of a shipper to make such a waiver does not put the carrier in any position to discriminate. The only discrimination, if discrimination there be, is against the particular shipper who has waived his defense and is therefore subject to suit when others are not; and, since this shipper has done so voluntarily and for a good consideration, he is certainly not in a position to complain of any undue or improper discrimination against him, as already pointed out.

If it should be seriously contended that the carrier is discriminating in favor of the shipper who waives the statute because it agrees to postpone suit against him for

the limited and reasonable period of the waiver, then the answer is that this amounts to no undue discrimination against other shippers, because the carrier is not in fact or in law required to sue all shippers at a date exactly equidistant from the accrual of the cause of action. Only by assuming such a requirement could it be claimed that other shippers were discriminated against where a carrier protracted negotiations with one delinquent somewhat longer than with another before actually filing suit.

Such mechanical identity of treatment of all shippers is not necessary to avoid the undue discrimination which the Interstate Commerce Act prohibits. To constitute such unlawful discrimination there must be, in the absence of express legislative definition to the contrary, something which can fairly be said to correspond to the idea of an improper benefit to the favored shipper or an actual harm to the shipper not favored. Certainly it would be straining language, as well as warping thought to an arid formalism, if such benefit or harm were held to result from a mere forbearance to sue, limited to a reasonable time, in exchange for a waiver of the statute of limitations for a corresponding period. By such an arrangement the carrier does not give up, as in the *Phillips* case, but on the contrary preserves its right of action; the shipper gets nothing but a brief and reasonable interval to determine its position, such as is incidental to the normal process of negotiations. To hold that such an arrangement may not lawfully be made would be to introduce an abstract and mechanical test into a practical business relationship, and would establish a purely formalistic requirement not in any sense needed to meet any real or potential evil, but solely for the purpose of attaining the impossible ideal of a complete mechanical identity of treatment between shippers.

How formalistic and futile it would be to hold invalid petitioner's waiver of the statute in the present case is shown by considering another state of facts which would

produce the same practical result that was sought to be accomplished by the challenged transaction here. Suppose, for example, that petitioner or any other shipper, impelled by considerations of equity or good conscience, were to pay a carrier freight charges which were lawfully due and owing but which the carrier had inadvertently neglected to collect and which had become barred by the statute of limitations. Would it be unlawful for the carrier to receive such payment of an amount which, because of the statute of limitations, it would be precluded from suing to collect? Obviously the receipt of such payment by the carrier would have precisely the same elements of discrimination, neither more nor less, that are here relied on by petitioner as grounds of illegality. In both cases the carrier would be receiving from one shipper what it might not be able to collect from another in a like situation; in both cases one shipper would be paying at a later time than the carrier could insist on payment by others. If these considerations are discriminatory in such sense as to invalidate the transaction, they should do so in both cases, if they do so in either. Yet the absurdity of the result in the case of the voluntary payment of charges barred by the statute is obvious. The only difference from the facts presented in the case at bar is that here, instead of a voluntary payment, there was a voluntary agreement to stand suit. There is no difference with respect to the alleged possibility of discriminatory results, and it is thus made more plain than ever by the case supposed that the alleged discrimination would consist only in an immaterial departure from complete mechanical identity of treatment of all shippers.

The Interstate Commerce Act has never purported to require a complete mechanical identity of treatment among shippers. This is conclusively shown by the fact that it outlaws only *unjust* discriminations and *undue* and *unreasonable* preferences and prejudices: *Texas and Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162

U. S. 197, 16 S. Ct. 666 (1896); *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 35 S. Ct. 370 (1915). In other words, for conduct to be unlawful under the Act, there must be shown not merely a technical difference of treatment, but a difference which has the quality of improperly advantaging one and improperly harming another. Clearly no such showing can be made with respect to a situation where the carrier preserves its right of action for a reasonable period in exchange for forbearance to sue during the same period, agreed upon as an incident to the procedure of negotiation and settlement.

The possibilities of harm inherent in such a situation are obviously far less than where a carrier extends credit to a shipper, because in the former case the reason for the forbearance is directly and immediately connected with the normal requirements of the process of negotiation. Yet even with respect to the granting of credit, until the subject was removed by legislation from the operation of general principle and brought within the scope of specific enactment, it was always held that there need not be a complete or mechanical identity of treatment between shippers. So long as the matter of extending credit was governed by the general terms of the Interstate Commerce Act and not by specific provisions applicable thereto, it was recognized and held by the courts that carriers were free to extend credit to one shipper and deny it to others if the circumstances under which the credit was extended in one case and denied in the other did not create a preference which was undue or unreasonable or a discrimination which was unjust. This is established in the leading case of *Gamble-Robinson Com. Co.* v. *Chicago & N. W. Ry. Co.*, 168 F. 161 (C. C. A. 8th, 1909). There, Judge Sanborn, speaking for the court, held that the refusal of the carrier to extend to the plaintiff the same credit that it customarily extended to other shippers did not amount to a violation of the Interstate Commerce Act, and in so holding said:

"That act [Interstate Commerce Act] left common carriers free to exercise to their full extent all the rights and privileges they had under the common law, so far as these rights and privileges and their exercise were not rendered unlawful by the provisions of that act. *That act did not make all preferences, advantages, prejudices, or disadvantages unlawful, but those only which are 'undue and unreasonable'* (p. 164).

* * * * * * *

"The true interpretation of that act is illustrated by the decisions which have been reviewed. It was expressed by Judge Jackson, afterwards Mr. Justice Jackson of the Supreme Court, in *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.* (C. C.) 43 Fed. 37, in these words, which have been subsequently three times affirmed and adopted by the Supreme Court of the United States as the true interpretation of this law:

'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give *undue preference* or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, *free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits'* (p. 167).

* * * * * * *

"The question, therefore, is, *did the defendant subject the plaintiff to any undue or unreasonable prejudice or disadvantage by requiring it to prepay the charges on its freight while the carrier cus-*

tomarily transported freight for others similarly situated without such prepayment? The defendant had the right under the common law to demand prepayment of its charges of the plaintiff and to grant credit to others for similar charges. It had the same right in this regard that every merchant, every man, and every corporation has to grant credit to one or to all but one, and to refuse it to others or to him. *There was nothing unjust or morally wrong in the exercise of this right, because the plaintiff had no moral right to the extension of credit, and justice did not require that the defendant should grant to the plaintiff the same credit that it extended to others.*

"The interstate commerce act did not expressly deprive the defendant of this right or make its exercise unlawful; so far as its express provisions are concerned, it left the right and its exercise among those which the Supreme Court declared that carriers were free to exercise and to manage upon 'the same general principles which are regarded as sound, and adopted in other trades and pursuits.'

"*The refusal to extend credit to a purchaser of goods, or of transportation, of financial responsibility, credit, and reputation equal to those of others to whom such credit is extended does not in the nature of things subject him to an undue or unreasonable prejudice or disadvantage,* while a requirement that such a vendor shall extend equal credit to all purchasers of equal financial responsibility, credit, and reputation, would subject him to unreasonable and undue disadvantage. Reason, sound business principles, and the practice of the business world give the option to extend credit to the seller of his property, or his services, and to the loaner of his money, and not to the purchaser or borrower. There are other considerations besides financial responsibility, credit, and reputation, which condition the rational extension of credit, such as the

> **experience of the seller or the loaner, the habits of the purchaser or the borrower, his fairness and promptness" (p. 168). (Emphasis supplied.)**

The same conclusion was reached by the Interstate Commerce Commission. In *Boise Commercial Club* v. *Adams Express Co.*, 17 I. C. C. 115 (1909), the Commission, in pointing out that the carrier is obliged by law to collect its charges in all cases, in order to avoid unjust discriminations and undue preferences, and that for this purpose the carrier may demand prepayment, said (p. 121):

> "To accept a shipment without prepayment is no more than *to extend credit* to the consignor, *and this within reasonable and nondiscriminatory limits it may do.*" (Emphasis supplied.)

See also *In Re Express Rates, Practices, Accounts and Revenues*, 24 I. C. C. 380, 399 (1912).

Thus it was the law, prior to the enactment of the Transportation Act of 1920, that carriers could within reasonable limits extend credit, *i. e.*, give additional time for payment, to some shippers and refuse such an extension of credit to other shippers. This was changed by the provisions of Section 3 (2) of the Interstate Commerce Act, added by the Transportation Act of 1920 (41 Stat. 479), which did not prohibit the extension of credit by carriers but only required such extension of credit thereafter to be subject to such rules and regulations as the Interstate Commerce Commission might require.*

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* The provisions of that enactment were as follows (41 Stat. 479):

"From and after July 1, 1920, no carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination: *Provided*, That the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia."

There is in the present case no question of any violation of the provisions of that section. Respondent in this case did not relinquish possession of the freight until it had received checks from petitioner's agent in the full amount of the freight charges. Its surrender of the freight upon receipt of those checks was in accord with its usual practice and with the regulations of the Commission, and it was not until it subsequently discovered the worthlessness of the checks that respondent was compelled to make further attempts to collect the charges, ultimately resulting in the negotiations and agreement with petitioner involved in the present suit.

Thus, all that respondent has done has been to agree with petitioner to forbear the institution of suit for a reasonable and strictly limited period of time and for a legitimate object. This is not prohibited by the provisions of Section 3 (2) or of any other section of the Interstate Commerce Act, and is justified by the same principles as those applicable to other extensions of time which have been held valid and nondiscriminatory where not specifically prohibited by the Act. For this Court now to hold that the respondent's extension of time in this case was improper and invalid, and that the shipper's waiver of the statute of limitations was likewise invalid because dependent thereon, would in effect amount to a judicial amendment of the Interstate Commerce Act so as to forbid, contrary to previously established law and established practice, a carrier from granting any extension of time to any shipper from whom it was attempting to collect its freight charges.

It follows from what has been said above that there is nothing in the agreement between petitioner and respondent which would render it, if enforced, a precedent tending to make possible future unjust discriminations and undue preferences in other cases. This is the real ground of distinction between the present case and the principal cases on which the petitioner relies, especially

A. J. Phillips Co. v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662, 35 S. Ct. 444 (1915), and cases following it, such as *Kansas City Southern R. Co.* v. *Wolf*, 261 U. S. 133, 43 S. Ct. 259 (1923). Because of the large number of cases of different types, cited by petitioner, it seems desirable to treat these in a separate section of this brief, for the purpose of showing that none of them is applicable to the present case. This will be done in the following section of this brief.

IV. The Decisions of This and Other Courts Do Not Support Petitioner's Position but on The Contrary Are Consistent with and Support Respondent's Position.

Of the more than sixty cases cited by petitioner, not one involves a waiver of the statute of limitations in an action brought by a carrier for the collection of freight charges.

So far as respondent has been able to determine, there has been only one reported decision on the precise question here involved, but the decision in that case is directly in point and squarely supports respondent's position. The case in question is *Pennsylvania R. Co.* v. *Susquehanna Collieries Co.*, 23 F. (2d) 499, decided by the District Court of the United States for the Northern District of Ohio on November 25, 1927. The following is the entire decision:

> "This cause is before me on defendant's demurrer to plaintiff's petition. Plaintiff's action is to recover demurrage charges. The point urged in support of the demurrer is that paragraph 3, Sec. 16, of the Interstate Commerce Act, as amended by Transportation Act 1920, Sec. 424 (Comp. St. Sec. 8584), requires that all actions at law by carriers subject to that act for the recovery of their charges or any part thereof shall be begun within three years from the time the cause of action accrues and not

after. Plaintiff's action was not commenced within three years. In excuse, it is pleaded that *within three years, and before the cause of action was barred, plaintiff and defendant entered into an agreement to waive the defense of the statute of limitations on condition that suit should not be brought within the statutory period, and that this agreement is still open and subsisting.* Plaintiff admits that under the Ohio practice the defense of the statute of limitations may be made by demurrer, if, on the allegations of the petition, the statute is applicable.

"Defendant urges that the right to recover demurrage charges is a right conferred by statute, to which is annexed as a condition that suit to recover must be brought within the statutory period, and hence that the right of action is barred, and cannot be prolonged or kept alive by an agreement such as would apply to an ordinary action.

"*Upon due consideration, I am of opinion that respondent's action to recover demurrage charges is not a right conferred by the Interstate Commerce Act, and is not within the authorities relied on by defendant. On the contrary, I am of opinion that plaintiff's right of action grows out of contract. This is none the less true, even though demurrage charges, like tariff rates, must be prescribed in a tariff filed with the Interstate Commerce Commission, and cannot be departed from or varied by the parties, either before or after the service is performed. The cases cited, arising under other provisions of the same section, have no application. In those cases the right of action did not grow out of contract, but out of the statute. No right of action existed except until and as the Interstate Commerce Commission made a finding of certain facts.*

"In view of this conclusion, it is unnecessary to consider whether a right created by statute, with a

condition annexed that it shall be enforced within a limited period, as suits for wrongful death, or actions on a reparation award of the Interstate Commerce Commission, may be kept alive by a voluntary agreement of the parties. It is difficult, however, to perceive any sound reason why it may not. Certainly none of the cases cited so hold.

"The demurrer will be overruled, and an exception may be noted." (Emphasis supplied.)

That decision appears to be the only case in the books involving the validity of such an agreement as that between petitioner and respondent in the present case, and it was there held that the agreement was valid and enforceable. As already stated, none of the cases cited by petitioner involves an action by a carrier against a shipper to recover freight or demurrage charges in which the shipper has waived or extended the provisions of Sec. 16 (3) (a) of the Interstate Commerce Act, by promising not to plead the limitation provisions therein.

Because of the very large number of cases cited by petitioner, it will simplify the discussion to devote this entire section to their consideration, and to analyze them under appropriate groupings. The cases cited by petitioner fall into the following classifications: (*a*) cases cited to sustain principles of law as to which there is no dispute in this case; (*b*) actions *against* carriers asserting causes of action created by the express provisions of the Interstate Commerce Act; (*c*) cases in which private arrangements between the parties are held invalid because they amount to actual unjust discriminations or undue preferences in violation of the express prohibitions of the Act; (*d*) actions by carriers against shippers which are distinguishable from the present case or which in principle support respondent's position in the present case.

Each of these groups of cases will be discussed separately.

A. Cases Cited as Sustaining Principles of Law Upon Which There is No Dispute in This Case.

Petitioner, at pages 8 and 9 of its "supplemental brief" in this Court, cites a number of cases in support of the propositions that a statute is to be construed in the light of its purpose and that the principal purpose of the Interstate Commerce Act was to eliminate unjust discriminations and unreasonable preferences among shippers. Respondent does not dispute these propositions, and there is therefore no need to discuss the cases cited in support of them.

B. Actions By Shippers Against Carriers Asserting Causes of Action Based Upon the Express Provisions of the Interstate Commerce Act.

The cases cited by petitioner which come within this group are the following:

A. J. Phillips Co. v. Grand Trunk Western Ry. Co., 236 U. S. 662, 35 S. Ct. 444 (1915). (pp. 13, 18, 19, 27).*

United States ex rel. L. C. Co. v. Interstate Com. Com., 246 U. S. 638, 38 S. Ct. 408 (1918). (pp. 15, 28).

Kansas City Southern R. Co. v. Wolf, 261 U. S. 133, 43 S. Ct. 259 (1923). (pp. 10, 13, 27).

Dauzer v. Gulf etc. R. Co., 268 U. S. 633, 45 S. Ct. 612 (1925). (p. 14).

Morgan's L. & T. R. etc. Co. v. Cocke, 273 U. S. 656, 47 S. Ct. 342 (1927). (p. 14).

Arkansas Fertilizer Co. v. United States; (I. C. C. Intervener), 193 Fed. 667 (1911). (pp. 16, 18, 38).

Allen v. New York, P. & N. R. Co., 15 F. (2d) 532 (C. C. A. 4th, 1926). (p. 47).

* The numbers appearing in parentheses after the citations refer to the pages of petitioner's "supplemental brief" in this Court at which the cases are cited.

Louisville & Nashville R. Co. v. *Cory*, 54 F. (2d) 8 (C. C. A. 6th, 1931). (pp. 14, 18, 39).

Zang v. *Railway Express Co.*, 130 Oh. St. 17, 196 N. E. 901 (1935). (pp. 14, 47).

Peninsula Produce Exch. v. *New York, P. & N. R. Co.*, 152 Md. 594, 137 A. 350 (1927). (pp. 14, 46, 53).

All these are cases of suits by shippers to recover damages for failure on the carriers' part properly to fulfill obligations specifically laid upon them by the Interstate Commerce Act and determined by the provisions of that Act, as, for example, their obligation to charge rates which are reasonable and in accord with their published tariffs (see discussion at pp. 18-25 above). Thus in all these cases, the suits were by the shippers against the carriers and were based on causes of action created by or derived from the Interstate Commerce Act. There is therefore an insurmountable distinction between all the cases in this group and the present case, first, because the causes of action sued on in those cases, being created by the Interstate Commerce Act, are subject to the rule that such a cause of action may be presumed to be terminated by the expiration of a limitation period contained in the same statute, in the absence of a contrary legislative expression of intent, and, second, because a result which would permit a *carrier* to waive the limitation provisions applicable to suits against it might well give rise to discriminatory practices, whereas such is not the case in a situation like that here presented, for the reasons above stated (see pp. 37-50 above).

This distinction between the cases cited by petitioner in this group and the present case can best be illustrated by a somewhat fuller consideration than has hitherto been presented of the leading case relied on by petitioner, which is also the case upon which practically all the other cases cited by petitioner are based, viz., *A. J. Phillips Co.* v.

Grand Trunk Western Ry. Co., 236 U. S. 662, 35 S. Ct. 444 (1915).

In the *Phillips* case certain carriers had filed a tariff with the Interstate Commerce Commission raising the freight rate on lumber. The Yellow Pine Association filed a complaint with the Interstate Commerce Commission contending that the increased rate was unreasonable. The Interstate Commerce Commission, after a hearing on the complaint, determined that the increase was unreasonable and required the carriers to return to their original rate.

The plaintiff was not a party to the proceeding before the Interstate Commerce Commission, but later brought an action under the provisions of the Interstate Commerce Act in a federal court for the recovery of damages based on the Commission's finding that the rates in question were unreasonable, the plaintiff having paid for certain shipments at those rates. The plaintiff made the order of the Interstate Commerce Commission a part of its complaint, and based its right to recover on that order.

The plaintiff had not filed its complaint within the two-year period then fixed by the Interstate Commerce Act for the commencement of actions by shippers against carriers to recover unreasonable charges. It sought to avoid the effect of that two-year limitation by contending that the case was governed by local state practice and that under such practice the carrier could not raise the defense of the statute of limitations by general demurrer to the declaration, which was the pleading that the carrier had filed. After stating, in the passage quoted above (p. 26), that under the limitation provision applicable to suits by shippers the lapse of time not only barred the remedy but destroyed the liability, Mr. Justice Lamar went on to say (p. 667 of 236 U. S.):

> "This will more distinctly appear by considering the requirements of uniformity which, in this as in so many other instances must be borne in mind in construing the Commerce Act. The obligation of the

carrier to adhere to the legal rate, to refund only what is permitted by law and to treat all shippers alike would have made it illegal for the *carriers*, either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different States, where a suit was brought in a court of competent jurisdiction; or to permit a *railroad company* to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the *waiver of defenses open to the carrier*. The Railroad Company therefore was bound to claim the benefit of the statute here and could do so here by general demurrer. For when it appeared that the complaint had not been filed within the time required by the statute it was evident, as a matter of law, that the plaintiff had no cause of action." (Emphasis supplied.)

Thus, the actual decision of this Court in that case was simply that a suit by a shipper for damages, based on a finding by the Interstate Commerce Commission that the rate in question was unreasonable, and brought against the carrier after the expiration of the limitation period provided in the Interstate Commerce Act for such suits, was barred. There was no question of any waiver or extension of the statute of limitations or promise not to plead the statute. Moreover, the limitation provision

there before the Court was only that which was applicable to suits by shippers against carriers. At the time of that case the Act did not include any limitation on suits by carriers against shippers, which were then subject only to the state statutes of limitations, so that neither the decision nor the language in the *Phillips* case can be considered as having been intended to apply to the subsequently enacted limitation provision which is involved in the present case.

It was in answering an argument based on a point of local practice that Mr. Justice Lamar used the language quoted above, to the effect that if the statute were not construed to destroy the liability at the expiration of the statutory period, unjust discriminations *by carriers* among shippers would be made possible. Even if it be granted that that language was an essential part of the decision of the case, it has no application to the present suit, first, because in the situation there involved the shipper's suit asserted a cause of action created by the Interstate Commerce Act, viz., the right to recover damages with respect to rates found unreasonable by the Interstate Commerce Commission, while in the present situation, as previously pointed out (pp. 18-25 above), the carrier's cause of action is based not on the Act but on the carrier's common-law rights under the contract of carriage; and second, because if the statute of limitations were not held to destroy the *carrier's* liability to the shipper, it would become possible for the *carrier* to create unjust discriminations by pleading the statute against some shippers and not pleading it against other shippers. Where the suit is by the carrier against the shipper, as it is in the present case, it is the shipper and not the carrier who waives the defense of the statute of limitations, and where such waiver is made under circumstances like those here presented, there is no violation of either the provisions or the policy of the Act, for the reasons already stated (pp. 37-50 above).

It is thus seen that the situation presented where a carrier sues a shipper to recover the lawful charges due to the carrier for its transportation charges is entirely different from the situation in which a shipper sues a carrier to recover damages for excessive charges, and it is only in the latter situation that the decision of this Court in the *Phillips* case and the language quoted above from Mr. Justice Lamar's opinion has application.

For these reasons, all the cases cited by petitioner in this group, and any other cases which involve suits by shippers against carriers for damages based on allegedly excessive charges, have no application to the present suit. Most of these cases quote or paraphrase the language of Mr. Justice Lamar's opinion in the *Phillips* case. In some of these cases the language from the *Phillips* case was properly applicable, and in some of them it may not have been, but in any event it is clear that, considering the facts of those cases and considering the point of Mr. Justice Lamar's language in the *Phillips* case, none of those cases properly controls the decision of the case at bar.

C. Actions in Which Private Arrangements Between Shippers and Carriers or Privileges Claimed by Shippers Have Been Held to Constitute Actual Unjust Discriminations or Undue Preferences Contrary to the Express Prohibitions of the Act.

In this group are the following cases cited by petitioner:

Chicago & Alton R. v. *Kirby*, 225 U. S. 155, 32 S. Ct. 648 (1912) (p. 36);

Pennsylvania R. Co. v. *International Coal Mining Co.*, 230 U. S. 184, 33 S. Ct. 893 (1912) (p. 35);

Atchison, T. & S. F. R. Co. v. *Robinson*, 233 U. S. 173, 34 S. Ct. 556 (1914) (p. 34);

Georgia F. & A. R. Co. v. *Blish Milling Co.*, 241 U. S. 190, 36 S. Ct. 541 (1916) (p. 24);

Texas & Pac. Ry. Co. v. *Leatherwood*, 250 U. S. 478, 39 S. Ct. 517 (1919) (p. 31);
Western Union Telegraph Co. v. *Esteve Bros. & Co.*, 256 U. S. 566, 41 S. Ct. 584 (1921) (p. 35);
Chesapeake & Ohio Ry. Co. v. *Martin*, 283 U. S. 209, 51 S. Ct. 453 (1931) (p. 32);
American Railway Express Co. v. *American Trust Co.*, 47 F. (2d) 16 (C. C. A. 7th, 1931) (pp. 36, 47);
W. H. Blodget Co. v. *New York Central R. Co.*, 261 Mass. 365, 159 N. E. 45 (1927) (pp. 35, 53);
Pennsylvania R. Co. v. *S. M. Hamilton Coal Co.*, 144 Md. 556, 125 A. 405 (1923) (p. 35);
Northern Wisconsin P. Co. v. *Chicago & N. W. R. Co.*, 203 Wis. 549, 234 N. W. 726 (1931) (p. 36);
American Railway Express Co. v. *Shideler*, 88 Ind. A. 645, 165 N. E. 336 (1929) (p. 22);
Cohen v. *Texas etc. Co.*, 303 Ill. A. 606, 25 N. E. (2d) 562 (1940) (p. 33);
William F. Mosser Co. v. *Payne, Director etc.*, 92 W. Va. 41, 114 S. E. 365 (1922) (p. 33);
Rogers v. *East Carolina R. Co.*, 186 N. C. 86, 118 S. E. 885 (1923) (p. 24);
Spartan Mills v. *Davis*, 126 S. C. 312, 119 S. E. 905 (1923) (pp. 23, 30);
L. M. Kirkpatrick Co. v. *I. C. R. Co.*, 190 Miss. 157, 195 So. 692 (1940) (pp. 10, 31);
Shroyer v. *Chicago etc. R. Co.*, 111 Tex. 24, 222 S. W. 1095 (1920) (p. 33).

All these cases are examples of the settled rule that carrier and shipper may not by their conduct or by private arrangements between them bring about the accomplishment of an unjust discrimination or undue preference or prejudice contrary to the provisions of the Act. All of them involve actions *by shippers against carriers* in which the question was whether effect should be given to

private agreements, or to conduct on the part of the carrier, as a result of which some right was allegedly waived by the carrier or some privilege was claimed by the shipper, contrary to the provisions of the carrier's published tariff or otherwise under such circumstances that an actual unjust discrimination or undue preference was created, in violation of the provisions in the Interstate Commerce Act prohibiting such discriminations and preferences. The courts of course refused in all those cases to sanction enforcement of such agreements or give effect to such conduct. Those cases have no application to the present suit, because, as already shown (pp. 37-41), there is no question here of any actual unjust discrimination or undue preference contrary to the prohibitions in the Act against such discriminations and preferences.

D. Actions by Carriers Against Shippers Which Are Distinguishable From the Present Case or Which in Principle Support Respondent's Position in the Present Case.

The cases cited by petitioner which fall into this group are the following:

Chicago, I. & L. Ry. Co. v. *Peterson*, 168 Wis. 193, 169 N. W. 558 (1918) (pp. 36, 46, 53);

Chicago & N. W. R. Co. v. *J. I. Case Plow Works*, 173 Wis. 237, 180 N. W. 846 (1921) (pp. 36, 46);

New York, N. H. & H. R. Co. v. *California Fruit Growers Exchange*, 125 Conn. 241, 5 A. (2d) 353 (1939); cert. den. 308 U. S. 567, 60 S. Ct. 79 (1939) (p. 33);

Central R. R. Co. of N. J. v. *Mauser*, 241 Pa. 603, 88 A. 791 (1913) (p. 41);

Galveston H. & S. A. R. Co. v. *Webster, et al.*, 27 F. (2d) 765 (W. D. Tex., 1928) (pp. 14, 25, 38, 44);

Vicksburg etc. R. Co. v. *Paup, et al.*, 47 F. (2d) 1069 (C. C. A. 5th, 1931) (pp. 46, 52);

Wisconsin Bridge & Iron Co. v. *Illinois Terminal Co.*, 88 F. (2d) 459 (C. C. A. 7th, 1937) (pp. 14, 17, 20);

Button v. *A. T. & S. F. Ry. Co.*, 1 F. (2d) 709 (C. C. A. 8th, 1924) (pp. 14, 28, 39, 45);

Pennsylvania R. Co. v. *Carolina Portland Cement Co.*, 16 F. (2d) 760 (C. C. A. 4th, 1927) (pp. 14, 39, 43).

Of the cases in this group, the first four are of particular significance, because they embody a principle which lies at the basis of respondent's position here. In each of those cases it was specifically held that the shipper would not be permitted to rely on any special agreement, local custom, or other device to escape payment of the freight charges which were otherwise lawfully due from it to the carrier, because to do so would be to perpetrate an unjust discrimination, contrary to the provisions and policy of the Interstate Commerce Act, by permitting the shipper to receive transportation services without paying the lawful charges therefor. Thus, in *Chicago I. & L. Ry. Co.* v. *Peterson*, the carrier's agent had negligently failed to collect the freight charges from the person to whom the freight was delivered, and the defendants, who were both consignors and consignees and therefore liable for the freight charges under the bill of lading, resisted the carrier's claim on the ground that its failure to collect the charges was contrary to a long-established custom, alleged to prevail between carriers and shippers of the particular commodity in question, that freight charges should be collected from the person to whom the freight was delivered, upon presentation of the bill of lading. The Supreme Court of Wisconsin overruled this defense and held the carrier entitled to recover its charges from the defendants, saying (p. 197 of 168 Wis.):

"To give this alleged custom, therefore, the effect asked for by the defendants in this case, would be

to place them as shippers in a different and necessarily more favored position than other merchandise shippers in the same locality in whose favor no such custom existed. There can be no such preferences lawfully given or created by any agreements between carriers and shippers under the Interstate Commerce Law."

In *Chicago & N. W. R. Co.* v. *J. I. Case Plow Works,* the shipper, in resisting the carrier's suit for freight charges lawfully due it, relied on a defense practically identical with one advanced in the court below by petitioner herein and mentioned but not seriously urged in its brief in this Court. The shipper-defendant in that case claimed that the carrier's agent had presented to it an expense bill showing that the freight charges had been paid by the person designated by the defendant to receive the freight, pursuant to which the defendant had made reimbursement for the charges thus represented to have been paid. The defendant claimed that the carrier was estopped by the negligent representation of its agent to claim the charges from the defendant, who would thus be compelled to pay the charges twice. This defense was rejected by the Supreme Court of Wisconsin, which held the carrier entitled to recover its charges from the defendant, saying (p. 240 of 173 Wis.):

"Unlawful acts of a carrier's agents in connection with charging and collecting the legal rates for transportation cannot be made the foundation of an estoppel to prevent the carriers from enforcing the legal rate against those liable therefor."

The same answer applies to the similar defense advanced by petitioner in this case (see discussion at pp. 71-72 below).

In *New York, N. H. & H. R. Co.* v. *California Fruit G. Exch.,* the shipper-defendant contended that the car-

rier should not be permitted to recover the freight charges from it because the carrier, in delivering the freight to a firm designated by the defendant for such delivery, had neglected to carry out the defendant's instructions to collect the freight charges from that firm before delivering the freight, and thereafter was unable to collect the charges from the firm designated by the defendant because of that firm's insolvency. The Connecticut court referred to cases holding that a carrier cannot by any act estop itself from exacting the lawful freight rate (see passage quoted above, pp. 38-39), and held that the defense could not be allowed and the carrier should be permitted to recover the charges because to hold otherwise would be to permit the very thing which the Interstate Commerce Act primarily sought to avoid, viz., the transportation of freight without the payment by the shipper of the full amount of charges lawfully due therefor.

In *Central R. R. Co. of N. J.* v. *Mauser*, the shipper-defendant sought to escape liability for a portion of the charges due on the ground that the carrier's agent had misquoted the rate. The court held that the carrier could not thus be barred from collecting the full amount of the charges which under the Interstate Commerce Act it was required to collect from all shippers alike.

Thus the effect of these four decisions was that the carrier was entitled to collect the freight charges and that the parties could not be permitted to use any means or device to enable the shipper to escape making such payment. If the reasoning of the courts in those cases is applied to the facts of the present case, petitioner will be precluded from accomplishing such a result, which it is apparently endeavoring to accomplish in this appeal.

The remaining five cases within this group constitute the only cases cited by petitioner which involve the effect of Section 16 (3) (a) of the Act, containing the limitation provision here in question, in suits by carriers against shippers. All these cases are distinguishable from the

present case and do not support petitioner's position. Before taking up each of them separately, it should be noted that in none of these cases was there involved any agreement not to plead the statute of limitations or any waiver or extension thereof. All of them were cases in which the holding of the court was merely that the carrier's suit was barred because the statutory limitation period had expired. The cases are cited by petitioner only because the courts used broad language usually borrowed from the opinion in the *Phillips* case and other cases following it, which language was not necessary to the decision, which was based and was supportable on other grounds. Consideration of each of these cases separately will show that petitioner can derive no support for its position therefrom.

In *Galveston H. & S. A. R. Co.* v. *Webster, et al.*, 27 F. (2d) 765 (W. D. Tex. 1928), a district court case decided in a slight and informal opinion, the carrier sued on a bond to recover freight charges from the shipper and its surety. The suit was brought more than three years after the carrier's cause of action had accrued, so that it was clearly barred as against the shipper. The only question was whether the carrier's claim was likewise barred against the surety, or whether recovery could be had under certain state statutes and procedures affecting the liabilities, rights and remedies of principal and surety. In holding that the limitation provision in the Interstate Commerce Act barred the claim against the surety as well as against the shipper-principal, the court pointed out that it was the purpose of Congress in enacting the limitation provision in question to provide one which would supersede the state statutes of limitation, and thereby eliminate the variations that existed under the state statutes. This holding was of course in accord with the legislative history of the limitation provision, as pointed out above (pp. 32-37). The court went on, however, to add a quotation from the *Phillips* case, which was

neither necessary to its decision nor appropriate to the facts before it.

In *Vicksburg etc. R. Co.* v. *Paup, et al.*, 47 F. (2d) 1069 (C. C. A. 5th, 1931), the sole question was whether a carrier's suit to recover charges erroneously refunded was governed by the state statute of limitations or by the limitation contained in the Interstate Commerce Act, and the court held that the federal statute governed, its purpose being to eliminate the variations which had existed as a result of the application of the different state statutes. In so holding, the court cited the *Phillips* case and other cases following it, as authority for the proposition that to permit the varying provisions of state laws to apply would "open the door to evasion and discrimination." Even if this language be accepted as appropriate to the decision, it has no application to the present case, since there is here no question as to whether or not the present type of suit is subject to the state statutes of limitations or to the federal statute. It is not disputed that the federal statute is applicable. The case therefore lends no support to petitioner's position.

In *Wisconsin Bridge and Iron Co.* v. *Illinois Terminal Co.*, 88 F. (2d) 459 (C. C. A. 7th, 1937), the charges on which the freight had originally been billed had been fully paid by the shipper, and thereafter the carrier sought to collect additional charges which it claimed were due. The shipper applied to the Interstate Commerce Commission for a determination of the lawful rate applicable to the shipments in question, and in that proceeding also raised a question as to the reasonableness of the rates. Ultimately the Commission held that additional charges were due, based upon a rate which was not the published tariff rate at the time of the shipments but which was found by the Commission to be reasonable and proper (*Wisconsin Bridge and Iron Co.* v. *Illinois Term. Co.*, 169 I. C. C. 197 (1930)). The shipper filed a peti-

tion for rehearing with the Commission and the carrier refrained from suing for the additional charges pending the disposition of the petition. After the petition was denied, the carrier brought suit, but in the meantime the three-year statutory period applicable to the carrier's claim had expired. There was no agreement by the shipper not to plead the statute, and the only basis on which the carrier rested its claim that the statute should not apply was the argument that the shipper was estopped to plead the statute because the carrier had permitted the period to expire for the purpose of allowing the shipper to seek rehearing before the Commission. Of course the case was not a proper one for the application of the doctrine of estoppel, because it did not appear that there was any representation or any promise made by the shipper and relied on by the carrier, to the effect that the statute of limitations would not be pleaded. Moreover, the cause of action asserted by the carrier in that case was plainly one which was created by the Interstate Commerce Act, since the question involved was as to the amount due and the carrier's suit was based on the Commission's ruling as to the reasonableness and propriety of the rate (see pp. 19-23 above). The court added, as an additional reason for its conclusion, the statement that under the decision in the *Phillips* case and the cases following it the lapse of time had destroyed the liability altogether. This statement was in no way necessary to the decision of the case, and, if accepted, involves an extension of the doctrine of the *Phillips* case not warranted, for the reasons already stated. Therefore, this case cannot be considered as affording proper support for petitioner's position here.

In *Button* v. *Atchison, T. & S. F. Ry. Co.*, 1 F. (2d) 709 (C. C. A. 8th, 1924), a situation somewhat similar to that in the *Wisconsin Bridge & Iron Co.* case was presented. The suit in the *Button* case was a suit by a carrier to collect additional charges, claimed to be due

under the applicable tariff rate, from the shipper who had previously paid in full the charge originally quoted to him. The court stated at the outset that there was no promise by the shipper to pay the charges claimed and that therefore the suit was one which was based, not upon the carrier's common-law rights under the contract of carriage, but solely upon the Interstate Commerce Act. Thus it said (pp. 709-10):

> "It is plain upon these facts that at common law the carrier could not have recovered of the shipper any *additional sum* as freight. *Its right to maintain the present suit is created by the Interstate Commerce Law* (Comp. St. §8563, *et seq.*). It arises out of the provision of that act which requires the carrier to collect, and the shipper to pay, the full charge named in the tariffs filed by the carrier with the Interstate Commerce Commission. * * * both the complaint and the judgment base the carrier's right to recover solely upon the Interstate Commerce Law." (Emphasis supplied.)

The shipment in question had moved prior to the enactment in 1920 of the limitation provision applicable to suits by carriers, but the carrier's suit had not been brought until after the enactment of that provision, and the question was whether that provision or the state statute of limitations was applicable. The statutory period provided in the state statute of limitations had expired, and the three-year period provided by the federal statute had expired if that three-year period were measured from the time the shipment in question moved. The carrier contended that the limitation provision in the federal statute should be applied and should be measured only from the date of enactment of that provision. But the court held that the carrier's rights could not be enlarged in that way and that, whether the federal or the state

statute of limitations applied, the limitation period should be measured from the time the cause of action accrued, so that in either event the limitation period had expired. As stated by the court (p. 711):

> "No injustice is done by combining the two statutes, and simply giving the carrier the benefit of the full term to which it was entitled at the time its action accrued."

Thus the court in that case rested its decision on a clear and proper ground which did not in any way involve the principle of the *Phillips* case and cases following it, viz., the ground that the applicable statutory period had expired, and there was no reason to enlarge or extend the statutory period. The court then went on to cite, as an additional ground for its decision, the principle of the *Phillips* case, but in so doing again stated that the plaintiff's cause of action was a creature of the statute which contained the limitation provision, in the following language (p. 711):

> "There is another ground upon which the case may be rested. Plaintiff's right of action is given by statute. It was not created for its enrichment, but to protect the public against secret rebates and discriminations. It is not a right of contract or of property. The right, therefore, is at all times under the full control of the legislature."

Plainly, that case on its facts and on the court's own reasoning has no application to the present situation. As the court itself said in that case (p. 712):

> "It is best to dispose of this case upon its own facts."

In *Pennsylvania R. Co.* v. *Carolina Portland Cement Co.*, 16 F. (2d) 760 (C. C. A. 4th, 1927), the shipment of freight in question was refused by the company which the shipper had designated to receive the shipment and the shipper neglected to give the carrier any further directions as to the disposition of the shipment. After the shipment was held by the carrier in storage for a time, the carrier sold it, and sued the shipper to collect the difference between the freight, storage and demurrage charges due and the amount received from the sale. The suit was brought more than three years after the tender of delivery of the shipment, and the principal question was whether or not the statutory period should be measured from that date or from the date of the subsequent sale by the carrier. The court held that, under the language of the Interstate Commerce Act and particularly Section 16(3) thereof, the cause of action must be considered to have accrued at the time of the tender of delivery of the shipment, with the result that the suit was barred by the statute of limitations. There was no question of any waiver or promise by the shipper not to plead the statute. However, in answering a secondary argument, to the effect that the defense of the statute of limitations could not be raised under the demurrer which the shipper had filed, the court cited the *Phillips* case and cases following, in support of the following statement (p. 762):

> "The cause of action is one created by statute, which fixes a time within which action must be brought as an essential element of the right to sue, and in such cases it is well settled that a declaration or complaint which shows on its face that the action was not brought within the time prescribed is demurrable."

Clearly, the court, in thus stating that the cause of action on which the carrier sued was created by statute, proceeded on a wrong premise. If that premise had been correct, the court's citation of the *Phillips* case would

doubtless have been appropriate. But, for the reasons stated above (pp. 18-25 above), it is not correct to say that a carrier's right to recover charges due it under its contract of carriage is created by the Interstate Commerce Act. There was no question as to the propriety of the amount of the charges claimed by the carrier or as to the proper interpretation of the carrier's published tariff, and therefore the carrier's cause of action was based on its common-law rights under the contract of carriage, and not on the Act. To that extent the decision of the court was placed on an erroneous ground, and therefore it cannot in that respect be considered as properly having any controlling effect on the decision of the present case.

Thus it is clear that in none of the cases cited by petitioner was there presented a situation comparable to that involved in the case at bar. In none of those cases was there any waiver of or promise not to plead the statute of limitations, and therefore the question of the validity of such a waiver or promise was not decided by any of them. Nor was there at issue in any of those cases the question whether an agreement of the character here involved would constitute a vehicle or device for discrimination which the policy of the Interstate Commerce Act requires to be struck down. On the contrary certain of those cases (see pp. 61-64 above) make it abundantly clear that any agreement or device relied on by a shipper for the purpose of avoiding payment of the charges lawfully due from it should not be permitted to stand in the way of the carrier's collection of the charges, in view of the policy of the Act against discrimination and the consequent requirement that the proper freight charges must be collected from all shippers alike. Petitioner's cases, when properly read and understood in the light of their facts and of the facts and reasoning in the *Phillips* case, do not support its position but on the contrary are consistent with that of respondent.

V. Respondent Is Not Estopped to Collect the Lawful Charges by Reason of Respondent's Dealings with Petitioner's Agent.

In the courts below petitioner unsuccessfully urged, as an additional defense, that respondent was estopped to collect the charges in question from petitioner because respondent had accepted checks from petitioner's agent, Jerome Company, and had thereupon receipted the freight bills and left them in Jerome's possession, on the basis of which Jerome secured a credit against petitioner for the amount of the charges. Petitioner ultimately conceded in the proceedings below that a defense of estoppel could not be maintained against a carrier's suit to collect charges lawfully due it, and this defense is not argued in petitioner's brief in this Court. However, it is briefly suggested at the conclusion of petitioner's statement of the case in its brief in this Court, and it therefore seems worth while to call the attention of the Court to the decisions which have made it plain that petitioner may not maintain such a defense in a case of this character.

The principal decisions on this point are those of this Court in which it has specifically held that a carrier may not be estopped to collect transportation charges lawfully due it, in view of the fact that the Interstate Commerce Act's policy against discrimination requires that every carrier be obliged to collect the charges lawfully due for its transportation services. This was held in *Pittsburgh, etc. Ry. Co.* v. *Fink*, 250 U. S. 577, 40 S. Ct. 27 (1919), where the shipper resisted the carrier's claim on the ground that he had paid all that the carrier had demanded of him and that the carrier was, therefore, estopped to collect more, and this Court, in holding the shipper liable, rejected that argument in the following language (pp. 582-3 of 250 U. S.):

> "Nor can the defendant in error successfully invoke the principle of estoppel against the right to

collect the legal rate. Estoppel could not become the means of successfully avoiding the requirement of the act as to equal rates, in violation of the provisions of the statute."

That holding was reaffirmed by this Court in *N. Y. Cent. R. R.* v. *York & Whitney Co.*, 256 U. S. 406, 41 S. Ct. 509 (1921), and again in *Louisville & N. R.* v. *Central Iron & Coal Co.*, 265 U. S. 59, 44 S. Ct. 441 (1924), where Mr. Justice Brandeis, citing the *Fink* and *York & Whitney* cases, said that no act or omission of the carrier could "estop or preclude it from enforcing payment of the full amount by a person liable therefor" (p. 65 of 265 U. S.).

The same principle has been stated and applied many times by other courts. See, for example, *Chicago & N. W. Ry. Co.* v. *J. I. Case Plow Works*, discussed and quoted above (p. 62), where the facts regarding the alleged estoppel were practically identical with those in the present case, and the point was decided against the shipper; *New York, N. H. & H. R. Co.* v. *California Fruit G. Exch.*, likewise discussed and quoted above (pp. 62-63); *Central of Georgia Ry. Co.* v. *Birmingham Sand & Brick Co.*, 9 Ala. App. 419, 64 So. 202 (1913); *New York Central R.* v. *Phila. & Reading Coal & Iron Co.*, 286 Ill. 267, 121 N. E. 581 (1919).

Plainly, there is no merit in this argument made below by petitioner, as petitioner apparently now realizes.

CONCLUSION.

It is submitted that, for the reasons stated above:

1. Petitioner's written promise not to plead the statute of limitations, made prior to the expiration of the statutory period for the purpose of inducing respondent to refrain from suing to collect petitioner's debt, and in

reliance upon which respondent agreed to forbear and did actually forbear bringing suit for a short specified period of time, is one which would unquestionably have been enforced at common law, by refusing to permit petitioner to plead the statute in repudiation of its promise;

2. Respondent's suit in this case, being a suit by a carrier to collect the full amount of the unpaid charges lawfully due it from a shipper for the transportation of the shipper's freight, and which the shipper in the bills of lading duly promised to pay to the carrier, is one which asserts a cause of action not created by or derived from the Interstate Commerce Act but based on respondent's rights as carrier and petitioner's obligations as shipper under the contract of carriage between them, and therefore this case does not fall within the line of cases holding that a cause of action wholly created by statute is presumed to have been intended by the legislature to be destroyed upon the expiration of the limitation provision provided in the same statute;

3. There is nothing in the language of the limitation provision contained in Section 16 (3) (a) of the Interstate Commerce Act which would require that petitioner's promise not to plead the statute of limitations should be held invalid; the phrase "and not after" in that provision is of no significance with respect to the issue here in question, and does not serve to distinguish that provision from other statutes of limitations generally;

4. There is nothing in the policy of the Interstate Commerce Act to require that petitioner's promise not to plead the statute of limitations should be held invalid, since under the circumstances of this case that promise did not constitute, and was not part of an arrangement giving rise to, any actual unjust discrimination or undue preference contrary to the prohibitions of the Interstate

Commerce Act, nor did it constitute a precedent making possible such unjust discriminations and undue preferences in other cases; on the contrary, if petitioner's position were sustained, an actual unjust discrimination and undue preference in favor of petitioner would thereby be made possible, since petitioner would be permitted to escape payment of the lawful charges which all other shippers in like position are required to pay;

5. None of the cases cited by petitioner holds that an agreement by a shipper not to plead the statute of limitations, such as that involved in the present case, is invalid and none of those cases can properly be considered as controlling the decision in the present case.

Accordingly, it is submitted that the judgment of the Supreme Court of California in this case should be affirmed.

Respectfully submitted,

JOHN DICKINSON,
WILLIAM F. ZEARFAUS,
JOHN B. PRIZER,
1740 Broad Street Station Building,
Philadelphia, Pa.
Counsel for Respondent.

FREDERIC D. MCKENNEY,
W. H. STAMMER,
Of Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 40.—October Term, 1943.

Mid State Horticultural Co., Inc., Petitioner, *vs.* The Pennsylvania Railroad Company.	On Writ of Certiorari to the Supreme Court of California.

[November 22, 1943.]

Mr. Justice Rutledge delivered the opinion of the Court.

The case is here on certiorari to the Supreme Court of California. Respondent sued to recover the full amount of freight charges on twenty-one carloads of grapes shipped by petitioner over its own and connecting carriers' lines from California to stated destinations in New York and New Jersey. The ultimate question is whether the action was brought in time under Section 16(3)(a) of the Interstate Commerce Act. This provided:

All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.[1]

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[1] 49 U. S. C. § 16(3)(a), 43 Stat. 633. Other pertinent parts of Section 16, as it was in force when this cause of action arose, were as follows:

"(3)(b) All complaints against carriers subject to this Act for the recovery of damages not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d).

"(c) For recovery of overcharges action at law shall be begun or complaint filed with the commission against carriers subject to this Act within three years from the time the cause of action accrues, and not after, subject to subdivision (d), except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

"(d) If on or before expiration of the two-year period of limitation in subdivision (b) or of the three-year period of limitation in subdivision (c) a carrier subject to this Act begins action under subdivision (a) for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier."

As to the section's legislative history, including changes made since this suit arose, see note 15 *infra*.

In the application presented by this record, the question turn on whether the section's limitation can be waived by expres agreement made before the period ends. The agreement wa made, at petitioner's request, three days before the term ex pired for suing on account of the first shipment. By its terms in consideration of respondent's forbearance to sue for a spe cified time, petitioner undertook not to "plead in any such suit th defense of any general or special statute of limitations."[2] Tw months later, but within the extended time, petitioner finall declined to pay and respondent began this action.[3]

In all stages of the litigation petitioner has contended tha the statute prohibits maintenance of the action, notwithstandin its agreement. Respondent has taken the contrary view, as hav the California District Court of Appeal, one judge dissentin (124 P. 2d 902), and the California Supreme Court (21 Ca 2d 243). We think petitioner's position must be sustained. I short this is that the agreement is invalid as being contrary t the intent and effect of the section and the Act.

In classical statement, the question has been posed as whethe the section operates, with the lapse of time, to extinguish th right which is the foundation for the claim or merely to bar th remedy for its enforcement;[4] and in this case, consistently wit

[2] After various recitals, including one fixing the time within which the d ferred suit might be brought, the agreement provided:

"Now, therefore, in consideration of the forebearance [sic] of The Pen sylvania Railroad Company to bring such a suit against the Mid State Hor cultural Company, Inc. prior to October 28, 1935, the said Mid State Hortic tural Company, Inc. hereby agrees that if and when The Pennsylvania Ra road Company may find it necessary to bring such an action, it, the said M State Horticultural Company, Inc., will not plead in any such suit the d fense of any general or special statute of limitations. . . . ."

[3] The following additional facts reveal more of the full character of t controversy:

In accordance with petitioner's diversion orders, respondent delivered t shipments to Jerome Distributing Company in October and Novemb r, 193 Jerome gave respondent its checks to cover the freight and received receipt freight bills, which it used to obtain a settlement of accounts with petition the latter says it would not have made without them. The checks were d honored on presentment for payment. Thereafter respondent sought witho success to collect from Jerome. It sued and obtained a judgment which could not satisfy because of Jerome's insolvency.

The time for suing on account of the first shipment expired October 1935. Some time before this respondent apparently threatened to sue pe tioner and the latter requested time to investigate. Respondent acceded, a on October 25, 1935, petitioner executed the agreement not to plead the statu

[4] The inquiry traditionally is cast in this mold regardless of whether t ultimate question concerns such varied problems as the propriety of invoki the *lex fori* rather than the *lex loci*, of waiving the defense or estopping t

the pattern, the debate has moved back to whether the cause of action is one created by the statute or one arising from the common law,[5] with the attributed consequence in the one case that the bar is absolute and invariable by any act of the parties, in the other that it may be waived by contract or otherwise.[6] Petitioner urges that the carrier's common law right to collect transportation charges from the shipper, which was strictly contractual, no longer exists, but has been replaced with one prescribed by the Act. This, it says, now fixes the character and dimensions of the carrier's recovery, including the time within which it may be had. Respondent however insists the Act has not superseded, but has merely modified its common law contractual right; and in this respect it asserts a distinction between cases, like this one, in which the carrier seeks the full amount of the transportation charges and others in which the suit is for only a part of them[7] or in which the shipper sues the carrier to recover excess charges paid or damages for the charging of unreasonable rates.[8]

We do not think the decision should turn on refinements over whether the residuum of freedom to contract which the Act leaves to the parties or the quantum of restriction it imposes[9] constitutes the gist of the action. Origin of the right is not *per se* conclusive whether the limitation of time "extinguishes" it or "merely bars the remedy" with the accepted alternative conse-

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defendant from asserting it, or of extending the period of limitation after it has once lapsed. See, e. g., Story, Conflict of Laws (8th ed.) § 582; Beale, Conflict of Laws (1935) §§ 604, 605; Goodrich, Conflict of Laws (1927) §§ 85, 86; Ailes, Limitation of Actions and the Conflict of Laws, 31 Mich. L. Rev. 474; Bement v. Grand Rapids & Ind. Ry., 194 Mich. 64; Gauthier v. Atchison, T. & S. F. Ry., 176 Wis. 245; McLearn v. Hill, 276 Mass. 519; Danzer & Co. v. Gulf & Ship Island R. R., 268 U. S. 633.

[5] Characteristically the inquiry follows this course too, however diverse the ultimate questions, in actions under wrongful death statutes, the Federal Employers' Liability Act, or directors' liability statutes, whether the limitation is imposed in the act creating the liability or a different one. See note 4 *supra* and cf. Davis v. Mills, 194 U. S. 451.

[6] Compare, e. g., Bement v. Grand Rapids & Ind. Ry., 194 Mich. 64, with McLearn v. Hill, 276 Mass. 519.

[7] E. g., Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 88 F. 2d 459 (C. C. A.); cf. Button v. Atchison, T. & S. F. Ry., 1 F. 2d 709 (C. C. A.); Galveston, H. & S. A. Ry. v. Webster Co., 27 F. 2d 765 (D. C.).

[8] E. g., A. J. Phillips Co. v. Grand Trunk Western Ry., 236 U. S. 662; Kansas City Southern R. R. v. Wolf, 261 U. S. 133.

[9] Cf. Louisville & N. R. R. v. Central Iron & Coal Co., 265 U. S. 59; Alton R. R. v. Gillarde, 379 Ill. 308; Pennsylvania R. R. v. Lord & Spencer, 295 Mass. 179; Galveston, H. & S. A. Ry. v. Webster Co., 27 F. 2d 765 (D. C.).

quences respecting waiver. Source is merely evidentiary, with other factors, of legislative intent whether the right shall be enforceable in any event after the prescribed time, which is the ultimate question.[10] The test of creation may aid when origin is clear.[11] It is not conclusive when the source is hybrid, as is true of the carrier's contract, which has become a complex or resultant of the former freedom of contract and statutory restrictions. It does not follow from the survival of the common law elements, as respondent maintains, that Congress did not intend the limitation to be absolute. And this seems impliedly conceded when the debate shifts, as it has, to whether the policy of interstate commerce legislation contemplates the one result or the other. This is the controlling question. Respecting it the consistent patterns of legislation followed in the Act and of judicial decision in treating problems of time limitation and related questions arising under it furnish the more persuasive indicia of Congress' intention.

Section 16 is an integral part of the Interstate Commerce Act and of the comprehensive scheme of regulation it imposes. The Act is affected throughout its provisions, with the object not merely of regulating the relations of carrier and shipper *inter se*, but of securing the general public interest in adequate, nondiscriminatory transportation at reasonable rates.[12] Accordingly, in respect to many matters concerning which variation in accordance with the exigencies of particular circumstances might be permissible, if only the parties' private interests or equities were involved, rigid adherence to the statutory scheme and standards is required. This "obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination." *Louisville & Nashville R. R.* v. *Maxwell*, 237 U. S. 94, 97.

With setting in such a statute, Section 16 expresses the specific policy of the Act with reference to the assertion of stale claims. On the section's face, this policy is one of uniformity and equality of treatment, as between carrier and shipper. The section con-

[10] Davis *v.* Mills, 194 U. S. 451, 454; see also Gregory *v.* Southern Pacific Co., 157 Fed. 113 (C. C. D. Ore.); Osborne *v.* Grand Trunk Ry., 87 Vt. 104.

[11] *Ibid.*

[12] Cf. Pittsburgh, C. C. & St. L. Ry. *v.* Fink, 250 U. S. 577; Louisville & Nashville R. R. *v.* Maxwell, 237 U. S. 94; Arkansas Fertilizer Co. *v.* United States, 193 Fed. 667 (Commerce Court).

ins not one, but several limitations. All are of short duration.[13] ney apply to various kinds of relief allowed in relation to matters verned by the Act. These include proceedings before the Com- ission and in the courts, by both shippers and carriers. The veral provisions are cast in uniform terms.[14] Not all were ought into the section at the same time. But the legislative story shows a constant tendency toward making them uniform time and the purpose of placing the carrier and the shipper equal terms in this respect.[15] Upon the face of the section thing suggests that the limitations are to be given other than entical effects, except as the language specifies variations. In rticular, contrary to respondent's contention, there is no indi- tion that, in applying the section, the carrier shall be given an dvantage not allowed to the shipper or one, in some instances, hen the carrier is plaintiff, which it cannot enjoy in others. ather, the section's terms, particularly in subdivision (a),[16]

[13] The uniform period is now two years. Cf. note 15 *infra*.

[14] All follow the formula "within —— years, but not after." Respondent ghtly says the formula itself, particularly as it includes "and not after," not conclusive, since it has received different constructions in respect to the esent issue. Thus, the phrase appeared in the earliest English general atutes of limitations, cf. 7 Chitty's English Statutes (6th ed.) 618-619, 9-625; and is found frequently in state statutes without having the effect outlaw waivers. Cf. Bewley *v.* Power, Hayes & Jones Exch. Rep. 368 833); Crane *v.* Abel, 67 Mich. 242; In re Estate of King, 94 Mich. 411; ickson *v.* Slater Steel Rig Co., 138 Okla. 238. On the other hand, special atutes employing the phrase have received opposing constructions. Cf. e state wrongful death statute involved in The Harrisburg, 119 U. S. 199. ee generally 132 A. L. R. 292 *et seq.*

[15] For the succession of enactments by which Section 16(3) assumed its esent form see 34 Stat. 590; 41 Stat. 491-2; 43 Stat. 633; 54 Stat. 912-3; 49 U. S. C. A. § 16(3), Historical Note. Briefly, Section 16(3)(a) was acted first as part of the Transportation Act of 1920, 41 Stat. 491-2. reviously state statutes supplied limitations upon carriers' suits for their harges, cf. Button *v.* Atchison, T. & S. F. Ry., 1 F. 2d 709, and upon certain ippers' suits against carriers (not based upon an order of the Interstate ommerce Commission), cf. Louisiana & W. R. R. *v.* Gardiner, 273 U. S. 280. oncurrently from 1906 the Hepburn Act (34 Stat. 590) supplied limitations pon shippers' assertion of claims for damages before the Interstate Com- erce Commission and in suits to enforce its orders. Section 16(3) assumed ubstantially its present form in the Act of June 7, 1924, 43 Stat. 633; al- ough after this action was brought the Transportation Act of 1940, 54 Stat. 12-3, reduced the period for carriers' suits from three to two years, to make conform finally with the time allowed shippers for testing the reasonable- ess of the carrier's rate, etc. From 1920 to 1940 this conformity had been chieved by extending the time for shippers' proceedings where the carrier a due season began suit to recover its charges. Cf. 43 Stat. 633, § 16(3)(d).

[16] The subdivision applies a single limitation to "*all* actions at law by arriers," whether "for recovery of their charges, *or any part thereof.*" Emphasis added.) Cf. note 1 *supra*.

their uniformity in all the limitations, its legislative history, and its setting in a statute designed certainly as much for the shipper's as for the carrier's benefit and in so many respects to avoid discriminatory practices and effects, all point to uniform construction of the limitations imposed. And this, we think, is the effect of the decisions which have construed them or predecessor provisions.[17]

With a single exception, *Pennsylvania R. R.* v. *Susquehanna Collieries Co.*, 23 F. 2d 499 (D. C.), the federal courts have not decided squarely whether an agreement such as is presented here is valid. In that suit to recover demurrage charges the court sustained and gave effect to the contract. But we think this is contrary to the general course of decision which has construed the section and predecessor limitations.

With the one exception, the decisions have fixed the pattern, in respect to a variety of issues relating to application of the limitations, that lapse of the statutory period "not only bars the remedy but destroys the liability." That is true of this Court's decisions[18] and those of the inferior federal courts.[19] It is true of suits by shippers against carriers and of suits by carriers against shippers.[20] It is true with respect to every limitation imposed by Section 16, unless that of subdivision (a) in favor of the carrier is to be excepted when its suit is for the full amount of its charges, though not when it is for only part of them.[21]

The purport of the decisions is that Congress intended, when the period has run, to put an end to the substantive claim and the corresponding liability. The cause of action, the very foundation for relief, is extinguished. Thus, in *A. J. Phillips Co.* v. *Grand Trunk Western Ry.*, this Court held the objection to the timeliness of the shipper's suit properly was raised by demurrer.

[17] Cf. note 15 *supra*.

[18] Cf., e. g., A. J. Phillips Co. v. Grand Trunk Western Ry., 236 U. S. 662; United States *ex rel.* Louisville Cement Co. v. Interstate Commerce Commission, 246 U. S. 638; Kansas City So. R. R. v. Wolf, 261 U. S. 133; Danzer & Co. v. Gulf & Ship Island R. R., 268 U. S. 633.

[19] Cf. Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 88 F. 2d 459 (C. C. A.); Button v. Atchison, T. & S. F. Ry., 1 F. 2d 709 (C. C. A.); Pennsylvania R. R. v. Carolina Portland Cement Co., 16 F. 2d 760 (C. C. A.).

[20] Cf. notes 18, 19 supra.

[21] Cf. note 7 *supra*.

d said that "the lapse of time . . . . destroys the liability . . . ether complaint is filed with the Commission or suit is brought a court of competent jurisdiction." 236 U. S. 662, 667. And assigned as a reason for this view "the requirements of uni-mity which, in this as in so many other instances must be ne in mind in construing the Commerce Act," including the rier's obligations to adhere to the legal rate, make only lawful unds, and refrain from discriminating among shippers "by nce or by express waiver, to preserve to the Phillips Company ight of action which the statute required should be asserted hin a fixed period." *Ibid.* In *United States ex rel. Louis-le Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. , the conception of the *Phillips* case was applied to proceed-s before the Commission, as the *Phillips* opinion had forecast. e Court held that the limitation goes to the Commission's isdiction, so that on the one hand it has no power to act when time has expired, on the other mandamus will lie to compel rcise of the jurisdiction when the period has not passed.[22] e other decisions cited above give effect to this pattern in ious applications.

Respondent attempts to avoid the conclusion to which the tern points by urging that when the choice of extending the iod is the carrier's rather than the shipper's, opportunities discrimination disappear; and the policy otherwise embedded Section 16 does not require enforcement of its terms. Rather, ays, to enforce them would violate the very policy upon which *Phillips* case based the carrier's immunity to suit after the iod. And further to support this view, especially as it re-es distinguishing results favorable to the carrier from those erse to it, it is said the legislative history of the incorpora-f into Section 16 of the limitation upon the carrier's recovery its full charges requires it to be given a different effect from t given all other limitations created by the section.

The argument is ingenious, but not convincing. In the absence explicit direction, it cannot be assumed or inferred that Con-ss intended to adopt one policy for the carrier and another the shipper, to give the former an absolute shield, the latter

[22] The latter was the particular result in the case, since the court found the od had not run prior to beginning of the proceeding.

one penetrable by all the devices and occasions which interrupt or extend the period of an ordinary general statute of limitations. Still less can it be implied that Congress intended the identical provision, subdivision (a), to work one way when the carrier sues only for part, another when it sues for the whole of its charges. That it is prohibited to discriminate among shippers, in applying the section's limitations, does not mean that in adopting them Congress intended to discriminate against all shippers in favor of the carrier. Nor does it mean the carrier may discriminate among shippers when it sues for all, but may not do so when it sues for only part of its charges. The fallacy is in assuming, first, that the section reflects only the Act's general policy against discrimination in respect to rates, rebates, etc.; and, second, that this would be made effective by treating the limitation as absolute to cut off the carrier's liability, but variable when the shipper's is involved. Neither assumption is true.

That the section does involve the statute's general policy against discrimination is clear from the opinion in the *Phillips* case and others cited. But this is true only so far as that policy is consistent with the particular policy laid down by the section, namely, that of strictly limiting the time within which claims may be asserted, as likewise appears from the decisions. In the *Phillips* case, there was no apparent clash between the two policies. Nor in this case is there more than an apparent one.

It is true the effect of holding the period invariable will be, when it has run, to relieve the shipper entirely of paying; and thus the carrier, by agreeing not to sue until later, may in effect allow the shipper a preference. But it has this within its control. And the same effect may follow when the amount unpaid is only a part of the total charge. It may follow in any case, whether the suit is for all or merely part, since the carrier, without agreement, may neglect or fail to sue and thus in effect allow the preference. Likewise, when the shipper sues, the carrier may suffer judgment by confession or default and so, in effect, accomplish the "preference," if the amount claimed is more than is rightfully due the shipper. When it is that and no more, allowing the carrier to escape by pleading the bar of the statute has the effect of permitting it to inflict a discrimination, as respondent concedes the statute requires.

The concession destroys its case. The consequences for discrimination are the same, whether the carrier or the shipper sues, since in the one case it may create a preference by foregoing suit, in the other by failing to defend. And it is as much an answer, in the one case as in the other, that the carrier's failure to assert its rights would violate its duty to collect.[23] That duty, and the results of failure to discharge it, may be the same, regardless of whether the carrier sues or defends depending upon whether the amount claimed is rightfully due.

The paramount policy of Section 16 is to secure promptness in collection. That policy would not be promoted by construing the period as variable when it works to bar the carrier's claim but invariable when the shipper sues. Nor does a legislative history which discloses a purpose to put carrier and shipper in equal position with reference to limitations of time sustain an inference that they are to be given effects favorable only to the carrier.

We are not unmindful of the hardship to respondent in the special circumstances, though petitioner asserts it would suffer equal hardship if the decision were the other way. Nor do we ignore the strong equitable considerations which, in relation to other types of legislation not so permeated with provisions and policies for protecting the general public interest, might move against denying effect to such an agreement. But this case boils down to an old adage about sauce and geese, which need not be given citation.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

[23] Cf. A. J. Phillips Co. v. Grand Trunk Western Ry., 236 U. S. 662, 667-668; Arkansas Fertilizer Co. v. United States, 193 Fed. 667, 671 (Commerce Court).